

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

4 HAFF POULTRY, INC., JOHNNY UPCHURCH,)
JOHNATHAN WALTERS, MYLES B. WEAVER,)
MELISSA WEAVER and NANCY BUTLER,)
5)
6 Plaintiffs,)
7)
8 vs.) No. CIV-17-33-RJS
9 TYSON FOODS, INC., TYSON CHICKEN,)
INC., TYSON BREEDERS, INC., TYSON)
POULTRY, INC., PILGRIM PRIDE)
CORPORATION and PERDUE FARMS, INC.,)
10)
Defendants.)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROBERT J. SHELBY
UNITED STATES DISTRICT JUDGE

JANUARY 6, 2020

* * * *

23 REPORTED BY: KEN SIDWELL, CSR-RPR
United States Court Reporter
P.O. Box 607
24 Muskogee, Oklahoma 74402

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6 Street, Suite 900, Philadelphia, Pennsylvania, 19106,7 MR. DANIEL J. WALKER, Berger Montague, PC, 2001
8 Pennsylvania Avenue NW, Suite 300, Washington, D.C. 20006,9 MR. GARY E. MASON, Whitfield Bryson & Mason, LLP, 5101
10 Wisconsin Avenue, NW, Suite 305, Washington, D.C. 20036.11 FOR THE DEFENDANTS:12 MS. RACHEL J. ADCOX, Axinn Veltrop & Harkrider, LLP,
13 950 F Street, NW, Washington, D.C. 20004, for Tyson,14 MR. CLAYTON E. BAILEY, Bailey, Brauer, PLLC, 8350 North
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16 Pilgrim Pride,17 MS. PATRICIA A. SAWYER, Whitten Burrage, 512 North
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19 Tyson,20 MR. LEONARD L. GORDON, Venable, LLP, 1270 Avenue of the
21 Americas, 24th Floor, New York, New York, 10020, for Perdue.

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JANUARY 6, 2020 PROCEEDINGS

(On the record at 9:48 a.m.)

10 MR. CRAMER: Good morning, Your Honor. Eric
11 Cramer from Berger & Montague for the plaintiffs. And we
12 also have in the audience Stephen Haff from Haff Poultry.

13 THE COURT: Great. Thank you.

14 MR. CRAMER: Thank you, Your Honor.

15 MR. SMITH: Good morning, Your Honor. Gary Smith
16 from Hausfeld on behalf of the plaintiff.

17 THE COURT: Welcome.

18 MR. WALKER: Good morning, Your Honor. Dan Walker
19 from Berger & Montague on behalf of the plaintiffs.

20 || THE COURT: Thank you.

21 MR. MASON: And good morning, Your Honor. Gary
22 Mason with Whitfield Bryson & Mason.

23 || THE COURT: Terrific.

24 MS. ADCOX: Good morning, Your Honor. Rachel
25 Adcox from Axinn Veltrop & Harkrider on behalf of Tyson

1 Foods.

2 THE COURT: Thank you.

3 MR. GORDON: Good morning, Your Honor. Leonard
4 Gordon from Venable Firm on behalf of Perdue.

5 MS. SAWYER: Good morning. Patricia Sawyer,
6 Whitten Burrage on behalf of Tyson Foods.

7 THE COURT: Thank you.

8 MR. BAILEY: Good morning, Your Honor. Clayton
9 Bailey from Bailey Brauer in Dallas on behalf of Pilgrims
10 Pride.

11 THE COURT: Good morning. Sorry to keep you all
12 for a few minutes this morning. We were having an IT issue.

13 So as we discussed during our telephonic status
14 conference in November what I anticipate accomplishing today
15 is providing you with rulings on the outstanding motions,
16 and then I think we have some case management work to do.
17 And I'll be asking all of you for some guidance and feedback
18 when we get to that point.

19 You'll want to take a moment before we begin
20 and look at your workspace and make sure there's nothing
21 sharp lest one of your colleagues be reaching for something
22 sharp to stab yourself while I give this oral ruling because
23 it is long. So if you have other work that you need to do
24 or whatever, take a nap, if you'd just keep your snoring
25 down a little bit, please, so the court reporter can hear.

1 We've attempted to be thorough and complete in the rulings
2 that we'll provide today. And the upside of that is that
3 you'll have the benefit, I hope, of a relatively complete
4 record in the event that you need it for some reason. The
5 downside is you'll just have to bear with us. There'll be a
6 long time before any of you speak again.

12 I have in my mind that we have some work that
13 we need to do with the complaint to ensure our compliance
14 with the bankruptcy court order respecting Pilgrims Pride
15 was it? Right.

16 One of the things that I'll be asking counsel
17 for the plaintiffs after we complete giving the ruling is
18 anticipating a likelihood that there will be a second
19 amended complaint to deal with the bankruptcy issues. There
20 isn't a motion pending for leave to file a further amended
21 complaint, and I think we ought to talk about what it is
22 that the plaintiffs would anticipate, or wish to achieve
23 through an amendment and the scope of that amendment, or
24 whether it's something that you all need time to consult
25 with your clients and then perhaps file a motion describing

1 in greater detail. The nuance or the complexity I see to
2 that is that my hope and desire, given the time that has
3 elapsed, is that we leave here today with sort of a time
4 line for moving forward and some clear guidance about how
5 and when the next steps will be achieved so that we can get
6 the train moving again.

7 I think, in the interest of completeness, it
8 may be helpful for us to begin by reminding ourselves where
9 we've been, and so I'll take a moment at the outset here and
10 provide I think a summary of our procedural history, and
11 then we'll move into the motions. And we'll take them up in
12 turn. First, the motion to dismiss and then the arbitration
13 motion.

14 So in January of 2018, we were together here
15 and received argument on, and the Court issued a ruling
16 effectively granting the motion or motions of the Koch
17 parties and Sanderson defendants' motion to dismiss for
18 personal jurisdiction and improper venue. And then when
19 last we were together, we received argument on the two
20 motions that the Court will be addressing today. The
21 transcript of that hearing is our Docket Number 229. That
22 hearing was in April, April 26 of 2018. And I think
23 prompted in part by some of the argument that we had during
24 that hearing, the defendant sought and received leave to
25 file supplemental briefing concerning allegations of a

1 relevant market, and the defendants filed that supplemental
2 briefing in May of 2018. That's Docket 234. That prompted
3 the plaintiffs to respond in June of 2018, Docket 239.

4 The Court then received additional briefing,
5 further briefing both in June and in July. First, the
6 defendants, through a motion, provided supplemental
7 authority, Docket 242. And the plaintiffs responded in turn
8 with -- well, responded to that supplemental authority in a
9 response that's Docket 243. And I'm going to take a short
10 detour here and discuss briefly the supplemental authority,
11 again in the interest of a complete and thorough record.

12 So I'll just be to the point here. The
13 supplemental authority submitted by the parties plays no
14 role in the Court's analysis today, other than, in some
15 instances, citations to some of the new cases for basic
16 Sherman Act principles. And the reason that the
17 supplemental authority is not significantly affecting the
18 Court's ruling is that, well, really, the reasons set forth
19 in the plaintiffs' response to that authority.

20 Briefly, the defendants submitted to the
21 Court the Supreme Court decision of *Ohio vs. American*
22 *Express Company*, a 2018 decision in which the Supreme Court
23 found vertical antisteering agreements in American Express's
24 contracts with its merchants not to be Sherman Act
25 violations under the rule of reason. The defendants contend

1 that that case is important here because, they argue, the
2 court clarified that a Sherman Act plaintiff must show a
3 relevant market when the alleged restraints at issue are
4 vertical.

5 In vertical cases we need a showing of a
6 relevant market because the entity imposing restraints must
7 have market power. Defendants analogized the American
8 Express merchant relationship there to the relationship here
9 among the poultry integrator companies and their
10 relationship to Agri-Stats and, for that reason, they
11 characterize the plaintiffs' claims in this case as being
12 vertical in nature. But in my judgment, accepting that
13 characterization ignores how the plaintiffs themselves have
14 chosen to plead their claim and how it has been alleged to
15 operate in the consolidated amended complaint, including the
16 horizontal nature of the reciprocity between the
17 integrators, which is merely facilitated by Agri-Stats and
18 is the real target of the plaintiffs' claims.

19 Agri-Stats, as we'll discuss at great length
20 today, takes the information from the integrators and then
21 shares it with the horizontal actors who further use it for
22 their own benefit. The conduct the plaintiffs challenge is
23 not vertical, and does not involve a vertical restraint in
24 the defendants' relationship with Agri-Stats. And so I
25 wholly agree, at this stage at least, with the reasoning in

1 the plaintiffs' response to the authority, Docket 243.

2 And let me say, I just commented on some of
3 the allegations. And I'll be referring today to facts
4 extensively in our discussion. And just by way of
5 background and a reminder, we're here at Rule 12. So the
6 facts that I'm relying on are largely drawn, but not
7 exclusively drawn here from the amended consolidated
8 complaint. And those facts in that complaint of course are
9 presumed to be true, though while pleaded allegations in
10 that complaint, presumed to be true.

11 I think it is appropriate, given the nature
12 of the claims, for the defendants to have provided
13 additional factual information, and I've considered that at
14 times as it's appropriate. And I failed to mention this at
15 the beginning because I haven't yet started into the
16 discussion about the motions on their merits. But you don't
17 need to -- you can set down your pens. Take whatever notes
18 you want. But I'm not going to be asking any of you to
19 prepare a ruling to submit an order for the Court's review.
20 Instead, we'll be placing on the docket in the next few days
21 an entry referring to the transcript of this hearing and
22 this portion of the hearing as the Court's ruling and the
23 basis for the Court's ruling. So you don't need to worry
24 about cramps in your hands.

25 All right. Returning to our procedural

1 history. In the first quarter of 2019, the plaintiff -- or,
2 excuse me -- the plaintiffs, yes, corresponded with the
3 Court specifically concerning Pilgrims Pride, and the
4 plaintiffs requested a hearing to take up those issues.
5 That was Docket 250. Pilgrims Pride responded and
6 questioned whether a hearing was necessary. And then, as I
7 said, in November when we spoke, I was slow to get a status
8 conference set in November. And my apologies again to all
9 of you and your clients for that delay. And while I
10 can't -- I can't go back and make up for that time, I can
11 assure you and I do assure you that you have my undivided
12 attention, and you will moving forward. We'll be fully
13 engaged to ensure that there are not any additional
14 unnecessary delays.

15 In any event, in the weeks leading up to the
16 status conference that we had in November, the plaintiffs
17 filed a motion to lift discovery -- or, excuse me -- the
18 discovery stay in this case. That submission was Docket
19 253. And of course, the defendants opposed that motion in
20 Docket 261.

21 During that November status conference, we
22 discussed the Pilgrims Pride issues, the need for this
23 hearing to provide an oral ruling rather than having
24 additional delay for the benefit of a written decision. And
25 during that hearing, I denied without prejudice the

1 plaintiffs' motion to lift the discovery stay.

2 So we'll proceed now, as I said, with oral
3 rulings on the outstanding motion to dismiss and the
4 arbitration, and then we'll take up some housekeeping
5 matters.

6 Throughout the hearing and throughout this
7 ruling, I will at times refer to page numbers in some of the
8 filings, especially with respect to the briefings. And just
9 so it's clear, I'll be referring to the pagination that the
10 court's docketing system places on the papers at the top of
11 the page, which does not usually align with the pagination
12 that the parties use when you prepare the documents
13 initially.

14 So we'll turn now to defendants' joint motion
15 to dismiss. And let me just say, because at some point
16 you'll become desperate for a break, we will take a break
17 after we get through the ruling on the motion to dismiss,
18 and we'll break before we come back to take up the
19 arbitration motion.

20 Turning then to the motion to dismiss, Docket
21 193. As I've said a moment ago, in consideration -- or the
22 ruling I'm about to provide is in consideration of the
23 defendants' opening brief, Docket 193; the plaintiffs'
24 opposition, Docket 200; the plaintiffs' reply, Docket 208;
25 the defendants' corrected supplemental brief, Docket 234;

1 the plaintiffs' response in opposition to the corrected
2 supplemental brief, Docket 239; defendants' additional
3 supplemental authority, 242; the response to that authority,
4 Docket 243; and then a careful review of our hearing
5 transcript. And I thank counsel again for your excellent
6 oral argument on the motions.

7 In this putative class action antitrust case,
8 six broiler chicken growers assert, in a consolidated
9 amended complaint, two causes of action against the
10 defendants who are broiler chicken integrators, companies
11 that purchase the broiler chicken grower services.

12 In their first cause of action, the plaintiff
13 growers assert a claim arising under Section 1 of the
14 Sherman Act, 15 United States Code, Section 1. I'm
15 referring now to the amended complaint, Docket 137 and
16 Paragraphs 165 to 169. In that claim, plaintiffs contend
17 the integrator defendants, together with other integrators,
18 formed a scheme not to compete amongst each other for grower
19 services in order to suppress grower compensation.
20 Plaintiffs allege this scheme is per se illegal under the
21 Sherman Act, and that it was effectuated through certain
22 facilitating agreements or practices, including, among other
23 things, first, the exchange of detailed current disaggregated
24 grower compensation data; and, second, by entering into
25 agreements not to solicit or poach each other's growers.

1 In their second cause of action, the growers
2 assert a claim for unfair practice in violation of Section
3 202 of the Packers and Stockyards Act, 7 United States Code,
4 Section 192(a). This is Paragraphs 170 through 178. The
5 defendant integrators jointly moved to dismiss the plaintiff
6 growers' consolidated amended complaint with prejudice
7 pursuant to Rule 12(b) (2), 12(b) (3) and 12(b) (6) of the
8 Federal Rules of Civil Procedure. And respectively, of
9 course, these rule provisions concern dismissal for lack of
10 personal jurisdiction, improper venue, and failure to state
11 a claim upon which relief can be granted.

12 The defendant integrators contend the growers
13 have not plausibly alleged a Sherman Act claim, nor a PSA
14 claim. Further, the integrators argue that the growers have
15 not shown that venue is proper in this district for the PSA
16 claim. And the defendants further argue that, if the
17 Sherman Act claim is dismissed, then any PSA claim brought
18 on behalf of non-Oklahoma plaintiffs must also be dismissed
19 for lack of personal jurisdiction.

20 We'll take a moment I think at the outset and
21 survey the plaintiffs' consolidated complaint that is the
22 basis for the motion to dismiss. The factual background, as
23 I said, is drawn from the allegations in that complaint, and
24 they are assumed at this stage to be true. And I cite *Abdi*
25 *vs. Wray*, a Tenth Circuit decision from 2019. Its factual

1 background will be familiar to all of you, though I
2 understand that some of it will be -- much of it will be
3 disputed by the defendants later in the case.

4 Broiler chickens account for nearly all
5 domestic chicken consumption. Their production is
6 concentrated in localized networks controlled by vertically
7 integrated companies like the defendants, who control nearly
8 every aspect of production under agreements known as
9 Contract Farming Arrangements, or CFAs, with thousands of
10 domestic poultry growers. Citing Paragraph 45.

11 The CFAs are substantially similar across the
12 integrators with nearly identical compensation terms.
13 Paragraph 57. The integrator defendants do not permit their
14 growers to provide grow-out services to any other
15 integrators. Paragraph 58. Growers are also barred under
16 their CFAs from sharing confidential compensation
17 information. Paragraph 64.

18 And now I'm going to refer at times today to
19 the defendants, and of course the original consolidated
20 amended complaint named five defendant families as I think
21 of them. And several of them have been dismissed, as we
22 said, the Sanderson and Koch parties most notably. But I'll
23 be referring to the defendants collectively as they were
24 named in the consolidated amended complaint for at least two
25 reasons. One, those are the allegations before us. And,

1 second, while they are no longer here, at least the Koch and
2 Sanderson related parties are still alleged to be defendants
3 that engaged in this conspiring agreement in restraint of
4 trade.

5 The defendants are the five largest U.S.
6 poultry integrators accounting for 60 percent of the grower
7 services. Paragraph 46. And as a result of a market shift
8 toward integration, there are only about 25 integrators in
9 the nation, and they collectively contract with about 97
10 percent of the domestic poultry growers, and that total is
11 around 30,000. I'm citing Paragraph 50. Growers provide
12 the land and specified facilities or so-called grow-out
13 houses, which can cost as much as \$300,000 or more to build,
14 and those facilities are designed to care for chickens until
15 the integrators take them. Growers often go into
16 substantial debt to begin providing grow-out services. And
17 even a well-performing grower may spend decades recouping
18 his or her initial investments. The integrators provide
19 birds, veterinary services, and supervision to the growers.
20 I'm citing Paragraphs 53 and 54, 59 and 61.

21 Since 2008, the defendants and other
22 integrators who control 120 broiler chicken complexes, about
23 98 percent of domestic broiler production, have shared
24 detailed non-public contemporaneous grower compensation
25 information, which is not shared with the growers

1 themselves. Paragraphs 66, 69 and 75. The integrators
2 share data on a weekly basis by disseminating to and
3 receiving from a third party company, Agri-Stats, the data.
4 Agri-Stats is a research firm whose mission is to "improve
5 the profitability" of its clients. And I've omitted some of
6 the language in the middle there that was not material.
7 Paragraphs 68 through 69, 72 and 75.

8 The information defendants and other
9 integrators share through Agri-Stats includes information on
10 complexes both regionally and based on individual farms.
11 Paragraphs 69 and 71. Defendants and other integrators
12 share granular data on grower compensation, as well as
13 numerous other categories of information concerning their
14 complexes, including general locations, monthly profits per
15 live pound, anticipated capacity, future output, equipment,
16 breeder stock characteristics, the number of chicks
17 delivered, broiler weights and mortality rates, production
18 rates per square foot, feed and medicine use, and
19 transportation costs. Paragraph 70.

20 The information is purportedly anonymous, but
21 lacks the safeguards necessary to prevent one with knowledge
22 in the industry from identifying which data belongs to which
23 defendants or other integrators, or which would prevent
24 people with knowledge in the industry from using that data
25 to determine grower compensation. Paragraphs 73 and 74.

1 In addition to the information shared through
2 Agri-Stats, the defendants and other integrators also share
3 chicken feed samples, Paragraph 76; permit access to each
4 other's complexes, including to Sanderson and Perdue
5 complexes in North Carolina, Paragraph 77; and high level
6 employees among integrators move freely amongst the
7 competing companies, unbounded by non-compete and
8 confidentiality agreements, Paragraph 78.

9 Plaintiffs allege defendants and other
10 integrators have an agreement not to solicit or to recruit
11 one another's growers. Paragraph 79. And evidence of this
12 includes the following: According to a letter written to
13 the federal Grain, Packers and Stockyards Administration,
14 one Tyson grower complained that he had inquired about a job
15 posting by non-defendant integrator Peco Foods, but when he
16 called Peco Foods, he was told that "the companies had an
17 agreement among each other not to take each other's
18 growers." Paragraph 80.

19 Quotes from articles and workshops suggesting
20 growers have experienced challenges in being hired by other
21 integrators are also included as well as -- well, and that
22 that information from the workshops and articles cause some
23 in the industry to believe that the companies have entered
24 into no-poach agreements. That information is set out in
25 Paragraphs 81 and 82. And the plaintiffs further point to

1 data, including the fact that only a small percentage of
2 growers switch integrators each year. For example, in 2014,
3 only 2.88 percent to five percent of integrators changed --
4 excuse me -- of growers changed integrators. That's set out
5 in Paragraphs 85 through 87. And the plaintiffs say that's
6 telling in view of the fact that 75 percent of growers have
7 more than one integrator in their geographic area and could,
8 therefore, theoretically switch integrators but for the
9 alleged no-poach agreement. Paragraph 89.

10 Plaintiffs allege that when growers do switch
11 integrators, the switch is accompanied by, if not driven by
12 a benefit to the integrator. And citing what appears to be
13 a hypothetical example in the complaint, the plaintiffs
14 describe a scenario under which one integrator may have
15 excess processing capacity and may, therefore, hire another
16 integrator's growers if the second has too many growers at
17 the time. That's set out in Paragraph 88.

18 The complaint identifies industry factors,
19 so-called plus factors, that the plaintiffs contend render
20 the industry susceptible to collusion and bolster the
21 plausibility of the overarching scheme that's alleged in the
22 complaint. And according to plaintiffs, these factors
23 include: High barriers to entry for integrators; two, high
24 exit barriers for growers, including requisite upgrades and
25 debt burdens; number three, inelastic demand; number four,

1 industry concentration; number five, fungibility of grow-out
2 services; number six, opportunities to collude, including
3 regular meetings of the National Chicken Counsel, three
4 annual board meetings at least, and industry leadership
5 involvement among representatives of the various defendants.

6 More, plaintiffs point to the fact that the
7 industry has been subject to antitrust scrutiny in the past,
8 and they point to the fact that the Department of Justice in
9 the 1970s shut down regular industry conference calls during
10 which broiler production and prices were discussed. That's
11 in Paragraph 125. Plaintiffs maintain that Agri-Stats has
12 effectively replaced those weekly conference calls.

13 The complaint provides information and
14 allegations concerning a relevant market and monopsony
15 power. In this respect, the plaintiffs allege the
16 defendants "collectively possessed market and monopsony
17 power" in the relevant market, which the plaintiffs define
18 as -- which the plaintiffs define as the purchase of
19 grower -- excuse me -- broiler grow-out services in the
20 United States. Paragraphs 129 and 136. Defendants buy more
21 than 60 percent of those services. Paragraph 132.
22 Plaintiffs allege that the uniform CFAs that integrators
23 impose with identical or nearly identical compensation
24 levels necessarily suppress grower compensation "in all
25 geographic regions in the United States." Paragraph 134.

1 And plaintiffs maintain that, absent this, the integrators
2 would compete and might open plants where other integrator
3 companies already exist. Paragraph 135.

4 The complaint goes on to identify alleged
5 anticompetitive effects of this scheme and injury suffered
6 by the class, or the putative class. Plaintiffs allege
7 grower compensation levels have been suppressed below
8 competitive levels due to the information sharing scheme,
9 Paragraphs 137 to 140, and the no-poach agreement,
10 Paragraphs 141 and 142. And due to suppression and the law
11 of supply and demand, this necessarily results, the
12 plaintiffs maintain, in fewer broilers being produced than
13 would otherwise be produced if the growers were paid
14 competitively, further resulting in reduced broilers on the
15 market and a higher market price to consumers. Paragraph
16 145.

17 And in this section of the complaint, the
18 plaintiffs discuss the tournament system, which fixes grower
19 compensation based on how growers rank against one another
20 on feed conversion rates and then apply formulaic
21 guidelines. The shared compensation information, plaintiffs
22 maintain, is used to set tournament system levels wherein
23 top growers receive base pay plus an incentive, while bottom
24 performing growers receive base pay less a disincentive.
25 Plaintiffs allege this system is one means by which the

1 scheme artificially reduces grower compensation. Paragraph
2 146.

3 So against that factual background, these are
4 the legal standards that the Court thinks are governing and
5 that I'm required to apply to the motion.

6 The defendants maintain in the Rule 12(b) (6)
7 challenge to the plaintiffs' Sherman Act claim that the
8 claim is subject to dismissal because the plaintiffs have
9 not plausibly alleged agreements amongst the defendants
10 either to poach each other's growers, or to exchange illicit
11 information.

12 The pleading standards are familiar to all of
13 you. Dismissal under Rule 12(b) (6) is appropriate only if
14 the complaint, viewed in the light most favorable to the
15 plaintiff, lacks enough facts to state a claim to relief
16 that is plausible on its face. And I'm citing again the
17 *Abdi* decision from the Tenth Circuit.

18 In deciding whether the plaintiff has
19 adequately stated a claim for relief, I'm required to view
20 the allegations in the consolidated amended complaint in the
21 light most favorable to the plaintiffs, accepting the
22 well-pled facts as true, and drawing all reasonable
23 inferences in the plaintiffs' favor. More language from
24 *Abdi* at Page 1025.

25 To avoid dismissal, plaintiffs' consolidated

1 amended complaint must comport with Rule 8(a)(2) of the
2 Federal Rules of Civil Procedure which requires a short and
3 plain statement of the claim showing that the plaintiffs are
4 entitled to relief. The Rule 8 pleading standard, the
5 Supreme Court has told us, does not require detailed factual
6 allegations, but it demands more than an unadorned
7 accusation. That's language from *Iqbal*, the 2009 decision
8 from the Supreme Court. A claim offering labels and
9 conclusions, or a mere formulaic recitation of the elements
10 of a cause of action are insufficient. The court explained
11 that in greater detail in *Iqbal*. Also insufficient are
12 claims tendering naked assertions devoid of further factual
13 enhancement.

14 Rather, to survive defendants' Rule 12(b)(6)
15 challenge, the plaintiffs must allege sufficient factual
16 matter accepted as true to state a claim to relief that is
17 plausible on its face allowing the court to draw the
18 reasonable inference that the defendants are liable for the
19 misconduct alleged. More language from *Iqbal*. And while
20 the court generally must accept factual allegations in a
21 proposed claim as true, it is not bound to accept as true
22 legal conclusions couched as factual allegations. That was
23 explained in *Twombly* at Page 555. *Twombly*, of course the
24 2007 Supreme Court decision, and we'll be talking more about
25 that in a moment. Rather, the factual allegations must be

1 enough to raise a right to relief above the speculative
2 level. More language from *Twombly*.

3 And when considering plausibility and fair
4 notice to the defendants, the degree of specificity
5 necessary in the plaintiffs' complaint necessarily depends
6 on the context. So said the Tenth Circuit in *Robbins vs.*
7 *Oklahoma*, a 2008 decision.

1 cases. A short plain statement of a claim for relief which
2 gives notice to the opposing party is all that is necessary
3 in antitrust cases as in other cases under the federal
4 rules." Of course, that's a 2001 decision and I'm omitting
5 the internal citations. As then-Judge Sotomayor continued,
6 "Furthermore, in antitrust cases in particular, the Supreme
7 Court has stated that dismissals prior to giving the
8 plaintiffs ample opportunity for discovery should be granted
9 very sparingly."

10 So turning now more specifically to the
11 Sherman Act claim, the Sherman Act, 15 United States Code,
12 Section 1 provides that every contract, combination in the
13 form of trust or otherwise, or conspiracy, in restraint of
14 trade or commerce among the several states, or with foreign
15 nations, is declared to be illegal. A plaintiff asserting a
16 claim under Section 1 must prove not only the existence of
17 an agreement or conspiracy between two or more competitors
18 to restrain trade, but also that the restraint is
19 unreasonable. That's a quote from the Tenth Circuit in
20 2017, the case, *Buccaneer Energy vs. Gunnison Energy*
21 *Corporation*.

22 Restraints are found to be unreasonable in
23 two ways. First, a small group of restraints are
24 unreasonable per se because they always, or almost always
25 tend to restrict competition and decrease output. That's a

1 quote from the Supreme Court in *Ohio vs. American Express*.
2 Put another way, agreements or practices are per se
3 unreasonable where, because of their pernicious effect on
4 competition and lack of any redeeming virtue are
5 conclusively presumed to be unreasonable and, therefore,
6 illegal without elaborate inquiry as to the precise harm
7 that they have caused or the business excuse for their use.
8 That's a quote from the *Buccaneer* decision from the Tenth
9 Circuit.

10 For example, under the Sherman Act, a
11 combination formed for the purpose and with the effect of
12 raising, depressing, fixing, pegging, or stabilizing the
13 price of a commodity in interstate or foreign commerce is
14 illegal per se. That's a quote from *United States vs.*
15 *Socony-Vacuum Oil Company*, a 1940 decision from the Supreme
16 Court. And, likewise, more recently, the Tenth Circuit has
17 stated that "horizontal price fixing and group boycott are
18 per se violations, so a plaintiff's failure to allege a
19 relevant market is not fatal to such a claim." That
20 discussion is in *Campfield vs. State Farm Mutual*, a 2008
21 decision.

22 In contrast, restraints that are not per se
23 unreasonable are evaluated under the rule of reason, which
24 requires a fact-specific assessment of market power and
25 market structure to assess the restraint's actual effect on

1 competition. Language again from the 2018 *American Express*
2 decision by the Supreme Court. And as the Tenth Circuit
3 said in *Buccaneer*, the rule of reason is the default
4 approach, and there is a presumption in favor of its
5 application. Under the rule of reason, the court seeks to
6 ascertain the extent to which challenged conduct harms
7 competition, and then to determine whether any such harm is
8 nonetheless justified by countervailing procompetitive
9 benefits.

10 So with those principles in mind, I'll now
11 turn to the defendants' specific challenges to the
12 plaintiffs' Sherman Act claim.

13 Defendants contend that the plaintiffs have
14 failed to plead adequately their Sherman Act claim. In
15 their opening brief, the defendants insist that the Court
16 should look past how the plaintiffs chose to plead their
17 claim, that is as an overarching scheme, illegal *per se*, not
18 to compete for grow-out services with facilitating
19 information sharing and no-poaching agreements. Instead,
20 the defendants ask us to evaluate those facilitating
21 practices distinctly as two separate agreements or claims
22 independently themselves. This argument is set out at Page
23 8 of Docket 193.

24 And at least in my judgment, in essence, I
25 construe the defendants' argument to be that the plaintiffs'

1 Sherman Act claim fails because it inadequately pleads two
2 Sherman Act claims that the plaintiffs are not independently
3 asserting. It seems to me, at its core, the defendants are
4 trying to redraft the plaintiffs' complaint. And, of
5 course, this they may not do.

6 Defendants urge that, when considered
7 separately, the defendants' pleading falls short.
8 Defendants argue that the no-poach agreement fails because
9 plaintiffs do not offer sufficient factual support for it,
10 and because there are obvious alternative reasons why
11 growers do not switch amongst integrators. And defendants
12 urge that, when considered distinctly, any information
13 sharing agreement must be analyzed under the rule of reason,
14 and that, under that rule, that claim fails. Defendants
15 only very briefly addressed the plaintiffs' overarching per
16 se scheme allegation in a few paragraphs only in their
17 opening brief and in reply. Defendants fleetingly argue
18 that the claim is factually unsupported, and that the Court
19 must analyze each agreement separately, and that the
20 information sharing claim, as I said, must be evaluated at
21 this stage under the rule of reason. The treatment of this
22 issue and the overarching claim is addressed in Docket 193
23 at Pages 18 and 20, and Docket 208 at Pages 3 and 4.

24 The plaintiffs respond that the consolidated
25 amended complaint plausibly sets forth a single overarching

1 conspiracy or scheme among the defendants not to compete for
2 broiler chicken grow-out services which had the effect of
3 keeping grower compensation artificially low. This
4 discussion in paragraph -- excuse me -- in Docket 200 at
5 Page 15, and Docket 137, Paragraphs 1 through 4. That's the
6 consolidated amended complaint.

7 In their briefing and in the consolidated
8 amended complaint, plaintiffs allege that the scheme is
9 illegal per se under the Sherman Act. Docket 200 at Page
10 10, the amended complaint at Paragraph 169. Plaintiffs
11 allege the overarching scheme had at least two complimentary
12 and mutually reinforcing elements. As we've said, first,
13 the agreement to share current, detailed, sensitive and
14 confidential business information, including grower
15 compensation. And that this agreement enables compensation
16 suppression, and allows conspiring integrators to monitor
17 input prices resulting in coordinated compensation levels
18 which disincentivises growers from switching amongst those
19 integrators. And then, second, a complementary no-poach
20 agreement not to solicit or hire growers from other
21 conspiring integrators, resulting in the growers' complete
22 inability to switch amongst at least those participating
23 integrators.

24 As I've said, while the plaintiffs urge the
25 Court to evaluate the two mutually reinforcing elements of

1 their alleged scheme together and to evaluate them in their
2 full context, they also argue that, if analyzed separately,
3 each component of the scheme is sufficiently alleged as an
4 independent violation of the section act -- or, excuse me --
5 Section 1 of the Sherman Act, and that the defendants'
6 arguments at this early stage, Rule 12, essentially amount
7 to affirmative defenses. That argument is on Page 10 of
8 Docket 200.

9 I decline for the reasons I'm going to now
10 explain -- at this stage of the proceeding at least, I
11 decline the defendants' invitation to recast the plaintiffs'
12 per se Section 1 Sherman Act claim plaintiffs clearly set
13 forth in their consolidated amended complaint as two
14 separate claims which must be separately analyzed.

15 Though the defendants offered separate
16 analyses of the information sharing and no-poach agreements
17 in their opening brief, their explanation concerning why the
18 Court -- they maintain -- the Court was required to analyze
19 them separately at the motion to dismiss stage was less than
20 compelling in both their opening brief and the reply brief.
21 And it leaves me, in my judgment, without a firm basis on
22 which to reach such a legal conclusion at this time. And I
23 feel like that might have been dense and not very clear.
24 What I mean is, the defendants have not persuaded me that
25 I'm required to disassemble the plaintiffs' single alleged

1 Sherman Act claim, and, instead, evaluate the component
2 constituent parts independently as if they were asserted as
3 independent claims under the Sherman Act.

4 And the cases cited by the defendants' 5 briefing leave me unpersuaded, as I've said, at this early 6 stage that the plaintiffs' overarching scheme must be 7 evaluated as two separate agreements. First, both sides 8 discuss in their papers *Todd vs. Exxon*, that 2001 decision 9 from the Second Circuit authored by now-Justice Sotomayor. 10 Defendants cite it for the proposition that, that while 11 plaintiffs -- "while plaintiffs allege a per se violation of 12 the antitrust laws, they cannot show this allegation with an 13 information exchange agreement, because it is well-settled 14 that information exchanges are addressed under the rule of 15 reason." That's set out in Docket 193 at Page 18. But *Todd* 16 only expressly provides that information exchange claims 17 asserted independent of an alleged unlawful agreement -- 18 excuse me -- independent of an alleged unlawful agreement, 19 in that case, of course, to fix salaries for certain 20 employees. Only independent claims of that nature are 21 analyzed under the rule of reason. In that decision, 22 then-Judge Sotomayor explained that horizontal price-fixing 23 agreements, illegal per se under the Sherman Act, may be 24 shown with evidence of "facilitating practices" such as 25 information exchange. A quote from Page 198 of that

1 decision. "Even in the absence of direct smoking gun
2 evidence, a horizontal price-fixing agreement may be
3 inferred on the basis of conscious parallelism where such
4 interdependent conduct is accompanied by circumstantial
5 evidence and plus factors such as defendant's use of
6 facilitating practices. Information exchange is an example
7 of a facilitating practice that can help support an
8 inference of a price-fixing agreement."

9 The court of appeals there distinguished the
10 use of information sharing as a facilitating practice
11 showing a *per se* illegal price-fixing agreement with the
12 "closely related but analytically distinct type of Section 1
13 claim where the violation lies in the information exchange
14 itself, as opposed to merely using the information exchange
15 as evidence upon which to infer a price-fixing agreement."
16 This distinct information sharing claim, recognized in many
17 cases cited in the papers from *Maple Flooring* on, is
18 analyzed under the rule of reason. But in *Todd*, the court
19 of appeals analyzed the information sharing at issue under
20 the rule of reason because the plaintiffs had not alleged an
21 actual agreement among defendants to fix salaries.

22 In contrast to the *Todd* case, the plaintiff
23 growers here have alleged an overarching horizontal
24 agreement amongst the integrators to refrain from competing
25 for grower services for the purpose of depressing grower

1 compensation. Defendants do not contest that this would be
2 a per se -- excuse me -- do not contest that this would be a
3 per se violation of the Sherman Act. And I conclude that
4 plaintiffs may, at this early stage, support their
5 allegations of that scheme in violation of the Sherman Act
6 per se with allegations of facilitating practices such as
7 sharing detailed non-public information, as well as other
8 plus factors plaintiffs identify from Paragraphs 90 through
9 128 in the consolidated amended complaint which "render the
10 industry susceptible to collusion and bolster the
11 plausibilty of the scheme." And those include, as I've
12 said, the high entry barriers for integrators, the high exit
13 barriers for growers, inelastic demand for both broilers and
14 grower services, industry concentration, fungibility of
15 grow-out services, and numerous opportunities to collude.

16 Defendants also cite and rely on *In Re*
17 *Processed Egg Products Antitrust Litigation*. It was a 2016
18 decision from the Eastern District of Pennsylvania. And,
19 specifically, defendants rely on it for the proposition that
20 the facilitating practices described in the plaintiffs'
21 Sherman Act claim must be evaluated separately before the
22 plaintiff can proceed at the motion to dismiss stage.

23 I don't read that case, as I've said, from
24 another district court in Pennsylvania to so require that
25 result. First, that case, like many of the cases relied on

1 and cited by the defendants, that case was decided at
2 summary judgment. The plaintiffs there had alleged the
3 defendant egg producers had conspired in violation of
4 Section 1 to reduce the domestic egg supply in an effort to
5 raise prices, and it's set out at Page 1036 of the district
6 court decision. The conspiracy was allegedly facilitated by
7 three programs, including a producer certification program
8 which increased minimum cage space per bird. And in the
9 summary judgment motions before the court, the defendants
10 focused solely on the certification program, arguing it
11 could not amend to a per se violation, but, instead, had to
12 be analyzed under the rule of reason. The court found that
13 issue a proper mode of legal analysis, as the court
14 described it, and presenting a legal question in the court's
15 view that was appropriate for summary judgment. This is
16 explained at Page 1039 of that decision. And the trial
17 court went on to explain that it concluded it would evaluate
18 the certification program separately and under the rule of
19 reason, despite the plaintiffs' arguments that the
20 defendants' collective actions in furtherance of the
21 conspiracy must be viewed as a singular attempt by the
22 defendants to artificially reduce egg supply, and that the
23 conspiracies to reduce egg supply were per se unlawful.
24 That's all explained at Page 1040 of the decision.
25 The court, nevertheless, did evaluate the

1 claims separately -- the arguments separately and under the
2 rule of reason without clear precedent supporting that
3 specific determination, but, instead, simply stating that
4 the plaintiffs' position "cannot possibly be correct"
5 because it would subsume the rule of reason in most, if not
6 all, circumstances. That discussion, the relevant
7 discussion again at Page 1040 of the decision.

8 I am not so confident as the district court
9 in Pennsylvania that that is correct, or that this is a
10 reason to reject a plaintiffs' view of their own claim at
11 the Rule 12 stage. Indeed, doing what the *Egg Products*
12 court did arguably undermines the plaintiffs' ability to do
13 something numerous courts have said plaintiffs may do; prove
14 a per se illegal price-fixing agreement with circumstantial
15 evidence and plus factors. It strikes me as strange that we
16 would break down each piece of a component of the component
17 evidence tending to show the agreement, and determine
18 whether, on its own, each piece satisfies the rule of
19 reason.

20 Nonetheless, for reasons that I will explain
21 in just a moment, my preliminary view of this issue is not
22 dispositive to my ruling on the Rule 12 motion, or whether
23 the case continues because, as I'll explain, I conclude that
24 at least the information sharing agreement is sufficiently
25 alleged under the rule of reason.

1 And the Court's decision at this stage and on
2 the limited briefing on this particular issue does not
3 foreclose the parties from raising this issue again at
4 summary judgment with more fully developed arguments and
5 with the benefit of a factual record. Indeed, summary
6 judgment, or appeal therefrom, is the posture of most of the
7 relevant cases cited by the defendants. But I just don't
8 find those cases conclusive at this stage of the litigation,
9 and on the sparse analysis that the defendants offer in
10 support of some of their arguments.

11 And I acknowledge that the less than entirely
12 clear language from Justice Kennedy in the *Leegin Creative*
13 *Leather Products* case to the effect that, if a vertical
14 agreement setting resale prices is made to support a clearly
15 per se illegal horizontal cartel, then the unlawfulness of
16 the resale agreement would need to be proven by the rule of
17 reason. I acknowledge that language. It's the 2007
18 decision. That language is found on Page 893 of the
19 decision.

20 And he continued, Justice Kennedy did, to
21 state that this type of agreement may also be useful
22 evidence for a plaintiff attempting to prove the existence
23 of a horizontal cartel. It's unclear to me at least, even
24 under that language, that these agreements supporting the
25 finding of a horizontal agreement that is per se illegal

1 must be independently proven under the rule of reason. But
2 I concede that conclusion could change if the argument were
3 further developed, and we'll have to -- my guess is we'll
4 have to evaluate it again at summary judgment.

5 Briefly, in their discussion of this issue,
6 the defendants also cite in their papers *In Re Citric Acid*
7 *Litigation*, the 1999 decision from the Ninth Circuit for the
8 I think fairly unremarkable proposition that courts have
9 rejected evidence of an information exchange alone as
10 sufficient to support a finding that there is a conspiracy.
11 But the posture and facts of that case are quite distinct
12 from those here where we are simply setting the pleadings at
13 a Rule 12 stage. In the *In Re Citric Acid Litigation* case,
14 there was an admitted conspiracy in the citric acid market,
15 but Defendant Cargill denied participating with other
16 conspirators. After class certification and after
17 discovery, Cargill obtained summary judgment on the
18 plaintiffs' claim it had used trade organization meetings as
19 a vehicle for engaging in a conspiracy.

20 Conducting an independent review of the
21 evidentiary record on appeal, the court of appeals there
22 found there was no evidence to support the plaintiffs'
23 claim. After disposing of plaintiff's argument that Cargill
24 participated in meetings where price fixing was admittedly
25 discussed by others, the court rejected plaintiffs' claims

1 that studying and meeting to discuss information about
2 Chinese citric acid producers was enough to support an
3 inference of a conspiracy involving Cargill, particularly
4 where minutes from the meeting indicated those in attendance
5 had rejected a suggestion to contact Chinese producers in an
6 effort to stabilize prices. That discussion is on Page 1098
7 of that decision.

8 For all of those reasons, I am unconvinced at
9 this stage that plaintiffs' overarching per se scheme claim
10 must be broken down and analyzed agreement by agreement,
11 including through the application of a rule of reason
12 analysis for the information sharing practices that are
13 alleged. Rather, as the plaintiffs state in their briefing,
14 together plaintiffs' allegations state a Section 1 claim.
15 Defendants' motion does not assert otherwise. That's
16 language from Docket 200 at Page 10.

17 And in the language of the *Twombly* decision,
18 beginning at Page 1966, the court said, "It makes sense,
19 therefore, to say that an allegation of parallel conduct and
20 a bare assertion of conspiracy will not suffice. Without
21 more, parallel conduct does not suggest conspiracy and a
22 conclusory allegation of agreement at some unidentified
23 point does not supply facts adequate to show illegality.
24 Hence, when allegations of parallel conduct are set out in
25 order to make a Section 1 claim, they must be placed in a

1 context that raises a suggestion of a preceding agreement,
2 not merely parallel conduct that could just as well be
3 independent action." And that is exactly what I think the
4 plaintiffs have alleged here.

5 And for that reason the defendants' Rule 12
6 motion will be denied. But even if I were required at this
7 stage, as the defendants urge, to analyze the overarching
8 schemes two primary facilitating practices or agreements
9 separately, as I've already said, I conclude the information
10 sharing agreement is adequately alleged under the rule of
11 reason. And though it's a close -- I think a close
12 decision, I also conclude that, if it was analyzed
13 separately and required to be adequately pled separately,
14 the no-poach agreements -- excuse me -- the no-poach
15 allegations at least fall short of plausibly alleging an
16 agreement amongst the integrators not to hire one another's
17 growers.

18 So in the interest of completeness, and
19 transparency in my ruling, and to the extent that it helps
20 inform the decisions all of you are going to make going
21 forward, even though I've already said that I think the
22 motion fails and that I'm not required to engage in this
23 analysis, I am, in this instance at least, nevertheless,
24 going to provide it. I think it may be helpful and
25 beneficial to all of you, and especially if we end up

1 revisiting this at Rule 56. I'll first take up the alleged
2 no-poach agreement.

3 Plaintiffs allege that, as part of the scheme
4 to suppress grower compensation, defendants and other
5 integrators agreed not to solicit or recruit one another's
6 growers. That allegation is set out in the consolidated
7 amended complaint at Paragraph 79. Plaintiffs assert they
8 have alleged facts proving both directly and
9 circumstantially this unwritten pact or agreement. And as I
10 said, though it's close, I conclude the plaintiffs have not
11 plausibly shown the existence of a no-poach agreement, at
12 least on the basis of the allegations contained in the
13 consolidated amended complaint.

14 First, plaintiffs discuss a letter written to
15 the federal Grain, Packers and Stockyard Administration in
16 which one Tyson grower complained that he had inquired about
17 a job posting by non-defendant integrator Peco Foods, but
18 that when he called Peco Foods he was told by an assistant
19 that "the companies had an agreement among each other not to
20 take each other's growers." That's in Paragraph 80 of the
21 complaint. Plaintiffs are unable to, or fail at least, to
22 identify who wrote the letter, when it was written, what
23 area of the country the grower was in, or any other
24 information surrounding the letter and the circumstances it
25 describes concerning the call that was made. If more detail

1 had been included, such as dates as perhaps the identity of
2 the grower, it may well be evidence of an agreement. But as
3 it is alleged, in my view, it falls short.

4 I may have said this at oral argument, and I
5 continue to study the allegations in the complaint. I
6 think, mindful of the legal standard that applies and
7 drawing the reasonable inferences from the facts alleged in
8 the complaint in the plaintiffs' favor, still, at most, in
9 my view, that allegation provides a reasonable inference
10 that Peco may have had an agreement with Tyson. Not that
11 the named defendants in this case had an agreement amongst
12 themselves. And it tells us nothing about when that
13 agreement may have existed. That's especially important I
14 think in the view of the nature in the view of the
15 overarching conspiracy alleged by the plaintiffs.

16 Next, plaintiffs allege unattributed grower
17 statements from articles and workshops suggest growers have
18 experienced challenges being hired by other integrators and,
19 for that reason, that they believe the companies have a
20 no-poach agreement. These allegations are found primarily
21 in Paragraphs 81 and 82. One quote is from a grower who
22 started working in the industry in 1995. That is the only
23 date alleged in the discussion of the articles and
24 workshops. Not even the dates of the articles or workshops
25 is alleged in the complaint. The nature of these

1 allegations, without strong corroborating evidence, is
2 simply a perception of unidentified growers and unidentified
3 integrators at unidentified times. And in my judgment, even
4 drawing the reasonable inferences in favor of the plaintiff,
5 that's insufficient.

6 As indirect evidence, plaintiffs allege that
7 only a small percentage of growers switch integrators each
8 year. And they point, as I've said, to 2014 as an example
9 where somewhere between just under three percent to five
10 percent of growers changed integrators. These allegations
11 are in Paragraphs 57 -- excuse me -- 85 and 87. This, they
12 complain, is despite the fact that 75 percent of growers
13 have more than one integrator in their geographic area and
14 could, therefore, theoretically switch but for the alleged
15 no-poach agreement. This is explained in Paragraph 89.

16 But in view of the lack of direct evidence,
17 and for the reasons the defendants discuss in their
18 briefing, the Court cannot conclude that those facts
19 plausibly suggest the existence of a no-poach agreement.
20 Low switching numbers could be due to a number of other
21 factors such as the initial investments a grower might make
22 in their facilities to comport with specific integrator
23 requirements. And let me say, I considered the fact that
24 one might reasonably infer -- I think -- I think this gets
25 tricky at Rule 12, drawing a line between those inferences

1 the Court concludes are reasonable inferences to draw from
2 the allegations, and then, when you've crossed that line and
3 you've essentially written new allegations for the
4 plaintiffs, which I'm not permitted to do. I don't read the
5 plaintiffs to allege that those threshold build-out
6 requirements are part and parcel with the alleged conspiracy
7 because they act to prevent the growers from moving from one
8 integrator to another. I don't see that allegation in the
9 complaint. I don't understand it to be part of the theory.
10 And for that reason, I don't think it's fair for me to draw
11 that inference, even though I think it is an inference that
12 could be drawn from the facts that are set out in the
13 complaint. And I'm not drawing that inference for purposes
14 of my analysis today.

15 On this point of the low number of growers
16 who switch integrators, the plaintiffs allege that when the
17 growers do switch, it's to benefit the integrator, not the
18 grower, and that the change is accompanied by a benefit to
19 the integrator. But in support of this contention, the
20 plaintiffs merely theorize, and what I -- it just strikes me
21 as a hypothetical example describing a scenario in which one
22 integrator may have excess processing capacity and may,
23 therefore, hire another integrator's growers if the second
24 has too many growers at the time. But that alone, again,
25 even drawing the reasonable inferences in favor of the

1 plaintiff, fails to carry the no-poach claim across the line
2 of plausibility.

3 And absent plaintiffs' allegations are facts
4 suggesting how much growers tried to switch in any given
5 year but were unable to do so. Indeed, there's not --
6 there's not a single allegation that I could see in the
7 complaint concerning any identifiable grower, including any
8 plaintiff who attempted to change integrators but was
9 unsuccessful or was denied that opportunity. Of course
10 that's not required to be stated, but when required to
11 consider the allegations in the complaint as a whole.

12 For all of those reasons, I conclude that if
13 the plaintiffs had pled as an independent Sherman Act
14 violation on its own the no-poach agreement, which
15 plaintiffs did not do, that the allegations in the complaint
16 do not plausibly state a distinct Sherman Act violation.

17 Next I'll take up the information sharing
18 agreement. Certain exchanges of information can give rise
19 to distinct Sherman Act violations that would be evaluated
20 under the rule of reason. And I'm citing here *Todd* at Page
21 198. When evaluating such an exchange under the rule of
22 reason, of course the court is required to consider a number
23 of factors, including most prominently the structure of the
24 industry involved and the nature of the information
25 exchanged. That discussion is also in *Todd* where Justice

1 Sotomayor, then-Judge Sotomayor was quoting the *Gypsum*
2 decision.

19 In contrast, the plaintiffs here contend that
20 they have included sufficient allegations in the
21 consolidated amended complaint to state a cognizable
22 information sharing claim under the rule of reason. They
23 allege that, at least since 2008, the defendants and other
24 integrator companies who control 98 percent of domestic
25 broiler production have shared detailed, confidential,

1 nearly contemporaneous information on complexes, profits,
2 capacity and output, a variety of costs and compensation.
3 And that that data is neither shared with the public, nor
4 even with the growers themselves. And I'm citing Paragraphs
5 66, 69 and 75 of the complaint. Plaintiffs further allege
6 that the integrators and other -- excuse me -- the
7 integrator defendants and other integrators share that data
8 on a weekly basis by disseminating their information to and
9 then receiving back information from other integrators,
10 including the other integrator defendants through the
11 Agri-Stats research firm. Paragraphs 67 through 69, 72 and
12 75.

13 Though the information is purportedly
14 anonymous, the plaintiffs maintain it lacks safeguards to
15 prevent anyone knowledgeable in the industry from
16 identifying which data belongs to which integrator, and then
17 using that to determine grower compensation. Paragraphs 73
18 and 74. In addition to the information shared via
19 Agri-Stats, the defendants and other integrators also shared
20 chicken feed samples, permit access to each other's
21 complexes, including to now-dismissed Sanderson and Perdue
22 complexes in North Carolina. Paragraph 77. And that the
23 defendants have numerous opportunities to share information
24 in person. Plaintiffs further allege that high level
25 employees move freely amongst companies unbounded by

1 uncompete -- non-compete, rather, and confidentiality
2 agreements, and that the integrators through executives
3 attend numerous industry meetings each year.

4 Defendants contend that these allegations
5 don't help -- do not help plaintiffs establish an
6 information sharing claim under the rule of reason for three
7 primary reasons: First, that the plaintiffs are unable to
8 show an agreement amongst one another to share the
9 information; second, that there are competitive explanations
10 for sharing the information; and, third, that the plaintiffs
11 failed to plead plus factors that would make the agreement
12 more plausible.

13 And, additionally in briefing that developed
14 after our last hearing really -- I think this argument was
15 made initially in a footnote, and then developed further in
16 reply, and then a great deal more after hearing the
17 defendants contend the plaintiffs have failed to plead a
18 plausible relevant market or an anticompetitive effect on
19 that market, and for those reasons, the defendants contend
20 any information sharing claim fails. I disagree.

21 First, I find the plaintiffs have
22 sufficiently alleged an agreement to share information of
23 the very kind and quality that troubles courts considering
24 these claims, and that that happened since at least 2008
25 when the defendant integrators and other integrators have

1 provided information to Agri-Stats knowing it would be
2 disseminated and that, in return, they would receive similar
3 information. And while defendants contend that all they did
4 was independently decide to participate in benchmarking,
5 this ignores the reality of what the plaintiffs allege, at
6 least in my view. That is, the reciprocal horizontal
7 agreement to exchange sensitive, detailed, current nonpublic
8 information. Plaintiffs contend that defendants did not
9 provide the highly sensitive, detailed, current nonpublic
10 information in a vacuum or as an act of public service.
11 They contend that they provided it because it would be their
12 ticket to receive the same sensitive, detailed, current
13 nonpublic information from all the other participating
14 companies. And that, in fact, that is -- and that they, in
15 fact, do share that information and they, in fact, do
16 receive that information in return.

17 Plaintiffs allege the who; the defendants and
18 other conspiring companies identified in the consolidated
19 amended complaint. They identify the what; the exchange of
20 sensitive, detailed, current nonpublic information with the
21 expectation that they would receive and they do receive the
22 same in return. They describe the when; since at least
23 2008. And the why; to reduce their costs, including grower
24 compensation.

25 Defendants, at least in my view, do not

1 squarely grapple with the reciprocal nature of the exchange
2 alleged, or the nature of the information exchanged, which
3 is in material contrast to the kind and type and quality of
4 information at issue in *Maple Flooring* and other related
5 cases. In the *Maple Flooring* case, as I've said, the
6 information was not current, and it was disseminated
7 publicly in trade publications.

8 I find that the plaintiffs have sufficiently
9 alleged an agreement to disseminate the sort of information
10 that causes heartburn for courts considering Sherman Act
11 information exchange claims.

12 And though defendants make much of the fact
13 they are not alleged to have met in person to exchange
14 information or develop benchmarks, as was true in some of
15 the other cases they cite and rely on, I fail to see how
16 it's material whether they meet in person, email the
17 information, post it on a confidential Google doc, or
18 provide it to one another through a third party conduit,
19 like Agri-Stats, who then disseminates the information among
20 the participating integrator defendants and others.

21 Viewing the facts favorably to the
22 plaintiffs, as I must at this stage, the defendants would
23 have been aware of the sensitive and current nature of their
24 own business information they were willing to share, and
25 they knew they would receive, and in fact did receive the

1 same information in return. Plaintiffs allege it is
2 possible, due to the granular nature of the data and
3 information, to ascertain which company provided the
4 information. Defendants do not explain adequately, in view
5 of these allegations -- how, in view of these allegations,
6 rather, it's material that Agri-Stats acted merely as a
7 middle-man or a clearinghouse or a data refiner, instead of
8 requiring the defendants to directly meet in person and
9 exchange the same information in person. Defendants do not
10 explain what difference it would make, if any, if the
11 defendants met in person and handed identical information to
12 one another in a meeting, or handed it to an assistant who
13 compiled it into tables and binders.

14 The allegation and the theory, again which I
15 am required to assume to be true at this stage of the
16 proceedings, is that the defendants knew that providing
17 Agri-Stats their sensitive information would provide them
18 reciprocal access to the same information from the others.

19 Next I consider the defendants' proffered
20 explanations for their reciprocal exchange of the sensitive,
21 detailed, current nonpublic information with one another.
22 Defendants contend that information exchanges help companies
23 compete. This is set out in Page 22 of Docket 193. But
24 this does not suggest how the information exchange helped
25 these defendants compete against each other rather than

1 unreasonably restrain grower compensation. Continuing,
2 defendants argue that monitoring one another's compensation
3 paid to growers makes sense and is consistent with
4 independent business decision making.

5 Setting aside that the information shared was
6 the sort that courts are routinely concerned about, as I've
7 already said, I simply do not read the plaintiffs to have
8 alleged defendants are independently acting, that is
9 monitoring one another in some kind of conscious parallelism
10 in their own independent but similar business interest as
11 was the case in *Twombly*. Rather, the plaintiffs have
12 alleged the defendants agreed to regularly hand over
13 sensitive, nonpublic information.

14 At this stage, I find plaintiffs' allegations
15 much more compelling than the insufficiently pled
16 independent actions in *Twombly*, particularly in light of the
17 plus factors that plaintiffs have alleged concerning the
18 movement of executives between companies without
19 confidentiality agreements, the opportunities to meet, the
20 complex tours -- the facility complex tours competing
21 integrators took, and the structure of the market which
22 renders it particularly susceptible to anticompetitive
23 information sharing. That is, it's highly concentrated,
24 involves fungible products, and is subject to inelastic
25 demand.

Finally, a rule of reason analysis will often require a showing of anticompetitive effects in a relevant market. And the parties here spend at least some of the real estate in their papers arguing about whether plaintiffs must necessarily plead a market if they have pled anticompetitive effects. For instance, the Supreme Court in *the Federal Trade Commission vs. Indiana Federation of Dentists* in 1986 observed that a naked restriction on price or output is not justified even in the absence of market power evidence. That discussion is on Page 460 of that decision. But even if the defendant had not engaged in such a naked restriction, the court suggested that sufficient evidence of anticompetitive effects obviated the need for an inquiry into market power which is but a surrogate for detrimental effects.

21 An alleged product market must bear a
22 rational relation to the methodology courts prescribe to
23 define a market for antitrust purposes, analysis of the
24 interchangeability of use, or the cross-elasticity of
25 demand. That's a quote from the *Todd* decision at Page 200.

1 At Page 129 of the consolidated amended
2 complaint, paragraphs -- I said page -- Paragraph 129,
3 plaintiffs allege the relevant market is the purchase of
4 broiler grow-out services, and the relevant geographic
5 market is the United States.

6 The Court evaluates these market allegations
7 bearing in mind that the deeply fact-intensive inquiry
8 required in market definitions leads many courts, it seems
9 to me most courts, to hesitate to grant motions to dismiss
10 for failure to plead a relevant product market. And I cite
11 for example the *Todd* decision and the discussion at Pages
12 199 and 200.

Indeed, many of the cases the defendants themselves rely on do not provide an evaluation of market definitions at the motion to dismiss stage. And I cite the *Tarabashi* decision from the Tenth Circuit in 1991. That was an appeal of findings following a bench trial on relevant market. And the *Buccaneer* decision from 2017, a Tenth Circuit decision that was an appeal from a ruling on summary judgment.

21 Defendants take issue with plaintiffs' allegations concerning a nationwide geographic market, 22 arguing it is fatally overbroad without any factual support, 23 and lacking in common sense. And these arguments are set 24 out in Pages 3 through 5 of Docket 234. The defendants 25

1 argue that it's implausible that growers would sell or
2 integrators would compete with grower services on a national
3 scale. Rather, defendants contend growers cannot plausibly
4 see integrators with a complex across the country as a good
5 substitute.

6 Even if the court could reach that factual
7 conclusion, it ignores that, absent the challenged conduct,
8 an integrator might compete for grow-out services in a given
9 area by moving into the area, or incentivizing growers to
10 move. And plaintiffs allege this in Paragraph 135 of their
11 complaint. Neither does the defendants' theory account for
12 the fact that a new grower might seek out, or an existing
13 grower might expand business in a different geographic area.
14 And integrators who feared losing new or expanding growers
15 to higher paying areas would presumably compete to retain or
16 retract growers in their geographic area.

17 In an attempt to meet that reasoning, the
18 defendants cite *Heerwagen vs. Clear Channel Communications*,
19 the Second Circuit decision from 2006, and specifically for
20 the proposition that the grower services market should not
21 be broadened simply because the integrators could buy
22 services nationwide. *Heerwagen* dealt with concert ticket
23 sales of course, as you all know. There, the court rejected
24 the notion that the market for attending live concerts was
25 nationwide where, importantly, after a lengthy evidentiary

1 hearing, no proof was adduced that a consumer in one city
2 would view a concert in another as a reasonable substitute.

3 I find that case unpersuasive at this stage.
4 It is logical that individual consumers, in that case
5 concert attendees, investing in one event in one city would
6 not view a concert in a far away place as a reasonable
7 substitute. But it is unclear why it would be simply
8 implausible to think, at this early stage and before we
9 evaluate the evidence, why the integrator companies would
10 not view growers in different areas as possible substitutes.

11 In any event, the posture of that case
12 underscores the concern that the *Todd* court expressed. That
13 except in situations of apparent implausibility, the court
14 should exercise caution in considering the dismissal of an
15 otherwise plausible, well-pled Sherman Act claim merely on
16 the basis of insufficient market allegations.

17 I conclude the plaintiffs have adequately
18 alleged, at this early stage, a grow-out services market,
19 and national geographic market, even if some aspects of the
20 market are in a sense local, in the language of the *Grinnell*
21 *Corporation* case from 1966.

22 We'll take up the plaintiffs' allegations of
23 the anticompetitive effect of the defendants' conduct, and
24 then we'll break. I think that will be a good time for a
25 break.

1 Turning to that issue, the defendants contend
2 that plaintiffs fatally failed to plead actual direct
3 anticompetitive effects, where there are no allegations in
4 the consolidated amended complaint that compensation
5 actually changed and by how much after any information
6 exchange. And this argument is I think best presented on
7 Page 5 of Docket 234. And though plaintiffs plead only that
8 the conspiracy began, I think the language of the complaint
9 is in or before 2008, they plead that compensation has been
10 declining since the 1980s, thus making it implausible to
11 blame a decline on a more recent illicit information sharing
12 agreement. But the plaintiffs allege that, since the 1980s,
13 the price of broilers has risen, while the grower's share of
14 the market price has declined. That's Paragraph 151. Even
15 if compensation had also been declining since the 1980s,
16 plaintiffs allege in their consolidated amended complaint
17 that the defendants' scheme caused it to be suppressed below
18 what would otherwise be competitive. And this is found in
19 Paragraphs 137 through 154. Plaintiffs support their
20 allegations with reference to economic theory, guidance from
21 the Department of Justice, and specific facts concerning
22 this industry in particular. And they allege that,
23 specifically since 2007 and 2008, grower pay has declined
24 while there have been increases in broiler wholesale prices.
25 Paragraph 151.

1 I find the allegations of anticompetitive
2 effect sufficient at this stage of the proceedings.

3 For all of these reasons then, I find that,
4 even if I am required to consider separately and distinctly
5 from the overarching scheme pled and alleged in the
6 complaint, the constituent agreements, the no-poach and the
7 information sharing agreement, I conclude that the
8 plaintiffs have included sufficient allegations in the
9 complaint to state a cognizable claim under the rule of
10 reason for information sharing in violation of Sherman Act,
11 Section 1. For these reasons, the Sherman Act claim will
12 survive the plaintiffs' (sic) joint motion to dismiss. The
13 overarching scheme, which was not directly attacked, is
14 supported by facilitating practice -- practices, and
15 other -- other allegations and practices that support the
16 inference of the existence of that agreement. Though, as
17 I've said, the no-poach agreement, while close, in my
18 judgment lacks the sufficient factual detail necessary to
19 nudge it over the line of plausibility.

20 So we'll take a brief break and we'll come
21 back to the Packers and Stockyards Act claim, and then the
22 Arbitration Act. And it occurs to me, I meant to say this
23 at the beginning of the discussion, instead I'm giving it to
24 you at the halftime break, but I could have provided this
25 oral ruling to you over the phone in a conference call. But

1 what's important, and I thought was important is the
2 business that we have to do following this. And so I still
3 think it was essential that we get together face-to-face,
4 and have a chance to visit about those things. Stretch your
5 legs, get some air, take an aspirin, we'll be back in a bit.
6 Thank you.

(Off the record at 11:22 a.m.)

(Back on the record at 11:37 a.m.)

11 There was another component to the rule -- a
12 few additional components to the Rule 12 motion to dismiss.
13 So we'll turn now to that portion of the motion relating to
14 the Packers and Stockyards Act.

15 The defendants argue that plaintiffs' claim
16 for unfair practices in violation of Section 202 of the PSA
17 fails because defendants maintain plaintiffs did not
18 adequately plead any anticompetitive agreement or requisite
19 anticompetitive effects. Docket 193 at Page 25. Of course
20 the PSA was enacted in 1921 with the primary purpose to
21 ensure fair competition and fair trade practices in
22 livestock marketing and in the meat packing industry, and to
23 safeguard farmers against receiving less than the true value
24 of their livestock. At least that's how the Tenth Circuit
25 described it in 2007 in *Been vs. Oklahoma Industries*.

1 PSA Section 202(a) makes it unlawful for a
2 live poultry dealer to engage in or use any unfair
3 discriminatory or deceptive practice or device. While it
4 was meant to be broader than antecedent antitrust
5 litigation, the Tenth Circuit has recognized that Section
6 202, nonetheless, incorporates the basic antitrust blueprint
7 of the Sherman Act and other preexisting antitrust
8 legislation. That explains in -- that is explained, rather,
9 in *Been* at 1228. Thus, the Tenth Circuit has held that
10 plaintiffs asserting a Section 202(a) claim must show that
11 the practice injures, or is likely to injure competition.
12 *Been* at 1230. This showing need not include any proof of an
13 intent to cause injury or any other unlawful effect. Thus,
14 in *Been* it was sufficient to create a genuine issue of
15 material fact to defeat summary judgment for the grower
16 plaintiff to show that the defendant was a monopsony in the
17 relevant market, and that economic theory supported the
18 conclusion that, without competition from other buyers, a
19 monopsonist will lower prices paid to sellers, which, over
20 time, results in higher consumer prices.

21 Under these principles, I conclude, for the
22 reasons I've already explained in denying dismissal of the
23 plaintiff's Sherman Act claim, that the plaintiffs have
24 adequately alleged both an information sharing practice or
25 agreement, potentially illicit on its own, or as a

1 facilitating practice furthering an agreement -- an
2 overarching agreement amongst the defendants not to compete
3 for grower services, and that anticompetitive effects
4 resulting from the defendants' conduct have been adequately
5 alleged. This suffices for the PSA claim under my reading
6 of the PSA and the *Been* decision, including the "likely to
7 injure" standard it approved, and the nature of the economic
8 evidence the Tenth Circuit found helpful to the plaintiffs
9 in reversing the district court's grant of summary judgment.

10 Defendants next contend that the plaintiffs' PSA claim must be dismissed because a mandatory venue provision in the PSA renders venue in this district improper. Defendants, in their opening memorandum, selectively cite from the PSA venue statute arguing that the statute "mandates that venue shall be located in the federal judicial district in which the principal part of the performance of a poultry growing arrangement or contract takes place." Citing 7 United States Code, Section 197b(a). Because no defendant performed under its grower contracts in this district, defendants argue venue is thus improper. This argument is set out on Page 27 of Docket 193.

22 But defendants' opening argument omits, and
23 does not analyze an important part of the venue provision,
24 that it applies only to any dispute among the parties to a poultry growing arrangement that arises out of the

1 arrangement or contract, in the language of 7 United States
2 Code, Section 197b(a).

3 After failing to include this provision in
4 it's opening brief, the defendants argue in reply that
5 because all plaintiffs are poultry growers under another
6 part of the PSA, meaning they raise live poultry under a
7 poultry growing agreement, they somehow must be subject to
8 the venue provision because, but for the poultry growing
9 arrangements, plaintiffs would not have standing to bring
10 their claims. This is the argument that develops in Docket
11 208 at Page 11. I disagree.

12 The defendants provide no analysis or legal
13 authority upon which I can conclude that plaintiffs' PSA
14 claim is governed by the mandatory venue provision, that the
15 claim amounts to a dispute between parties to a poultry
16 growing arrangement and arising out of the poultry growing
17 arrangement or contract.

18 As plaintiffs point out, and defendants do
19 not contest in their reply, the PSA claim in this case does
20 not involve only a dispute between parties to a poultry
21 growing arrangement. Rather, each plaintiff was a party
22 under such an arrangement with only one integrator, not all
23 defendants; and, second, therefore a dispute arising out of
24 the arrangement or contract. No plaintiff is seeking to
25 enforce any contractual provision. The mandatory venue

1 provision in the PSA, at least in my judgment, does not
2 apply in this case.

3 Finally, the defendants argue that, if the
4 Court had dismissed the plaintiffs' Sherman Act claim, it
5 must dismiss the PSA claims asserted by the non-Oklahoma
6 plaintiffs, all but Haff Poultry, for lack of personal
7 jurisdiction.

8 Without the Sherman Act's nationwide service
9 of process provision, these plaintiffs would have to rely on
10 Oklahoma's long arm statute to establish personal
11 jurisdiction over the defendants, and defendants claim they
12 are not subject to personal jurisdiction in Oklahoma under
13 the long arm statute. But because the Court has not
14 dismissed the Sherman Act claim, I decline to find the
15 plaintiffs are incapable of establishing personal
16 jurisdiction on that basis.

17 That leaves us I think just with Perdue's
18 motion to compel arbitration and to dismiss, or, in the
19 alternative, to stay. I guess I should have summarized a
20 moment ago. I think I've now addressed all the arguments in
21 the Rule 12 motion. And for those reasons stated, that
22 motion is denied.

23 So turning to the motion to compel, Docket
24 192, in addition to joining defendants' motion to dismiss at
25 the joint motion, defendant Perdue Farms separately moves to

1 dismiss or stay pending arbitration the claims of one
2 plaintiff, Nancy Butler.

23 The procedures outlined in Butler's agreement
24 with Perdue require any party instigating arbitration to do
25 so within 120 days after the complaint or issue arose.

1 Citing Docket 192-2 at Page 11, Paragraph 3. Each party
2 bears its own cost in arbitration and they share equally the
3 cost of paying for an arbitrator who has expertise in the
4 poultry industry. Paragraphs 5 and 6. Discovery is
5 permitted, but only, if at all, after the arbitrator
6 authorizes it upon a showing of substantial need. I'm
7 citing Paragraph 8. And the arbitrator has no power to
8 award, and the parties are barred from seeking in any other
9 forum, non-monetary or equitable relief, damages
10 inconsistent with the parties' agreement, or punitive
11 damages not measured by the prevailing parties' actual
12 damages. Paragraph 9.

13 In the 2015 agreement, Butler and Perdue also
14 waive any right to assert class action claims against one
15 another, and they agree they will not lead, join, or serve
16 as a member or a class bringing such a claim. Paragraph --
17 let's see. I think that's -- now I'm missing the cite to
18 that. I apologize. When Butler signed the agreement in
19 2015, she additionally signed an opt-in provision relating
20 specifically to the arbitration agreement agreeing that she
21 "accepted the arbitration provisions as set forth in this
22 agreement." Such a conspicuously disclosed opt-in provision
23 is required for arbitrating clauses to be minimally valid
24 and enforceable under the PSA. And I'm citing here 7 United
25 States Code, Section 197c(a) (b).

1 In 2017, Butler signed a modification to the
2 2015 agreement. It was an updated fee schedule. Docket 205
3 at Page 3. She did not sign a new opt-in agreement relating
4 to arbitration. Plaintiffs fault Perdue for not including
5 an opt-in agreement in the 2017 fee modification.

6 Let me just quickly dispose here of an
7 argument the plaintiffs advance in their papers, that Perdue
8 was required to include a new opt-in provision along with
9 the 2017 modification. At least on the arguments before me,
10 I cannot reach that conclusion. Perdue persuasively points
11 out that the 2017 modification makes clear on its face that
12 it is simply an updated fee schedule applicable to the
13 earlier entered 2015 agreement. And that Butler, in signing
14 the 2017 updated schedule, agreed to be continued -- agreed
15 to be bound by the terms -- the other terms of the 2015
16 agreement.

17 Turning to the motion, Perdue argues that,
18 pursuant to the arbitration provision in the 2015 agreement,
19 Butler has contracted with Perdue to arbitrate her Sherman
20 Act and PSA claims that she now brings, and that this
21 arbitration clause requires that I dismiss those claims.
22 But Perdue argues that if Butler's claims are not dismissed
23 pursuant to the arbitration clause, then all claims against
24 Perdue in this action should be stayed pending Butler's
25 arbitration because none of the other plaintiffs were Perdue

1 growers, and none have alleged they were denied the
2 opportunity to be a Perdue grower pursuant to the
3 overarching conspiracy alleged.

4 Perdue finally argues that Butler also waived
5 certain rights relating to this litigation. They include
6 the ability to seek treble damages, the ability to lead,
7 join, or serve as a member of a class in a class action, and
8 also the right to trial by jury.

9 Plaintiffs advance four primary arguments in
10 opposition to Perdue's motion. This begins in Docket 201.
11 First, plaintiffs maintain that Perdue's motion is futile.
12 I think that they mean that it won't have meaningful impact
13 on the litigation because Butler would still have conspiracy
14 claims against the other defendants, and the other
15 plaintiffs would still have such claims against Perdue. I
16 agree.

17 Plaintiffs assert claims alleging
18 anticompetitive agreements amongst all the defendants
19 demonstrated or supported by the no-poach agreement and the
20 illicit information sharing agreement that had the effect of
21 lowering compensation to all growers, regardless of their
22 specific contracting integrator. And Perdue's argument in
23 its reply on this point I thought was quite unhelpful,
24 pointing simply to the fact that there's a contractual
25 relationship between distinct growers and defendants. But

1 of course this does not mean that the contractual
2 relationship is necessary to pursue claims.

3 Second, the plaintiffs argue that Butler's
4 Sherman Act and PSA claims are simply not covered by the
5 arbitration agreement. Third, the plaintiffs argue the
6 arbitration provision is unenforceable under the effective
7 vindication doctrine. Of course, Justice Scalia articulated
8 that doctrine in *American Express vs. Italian Colors*
9 *Restaurant* and described the doctrine as a judicial
10 willingness to invalidate on public policy grounds
11 arbitration agreements that operate as a prospective waiver
12 of a party's right to pursue statutory remedies. That case
13 of course was a 2017 Supreme Court decision, and that
14 language I just quoted, with a part in the middle not
15 material or relevant omitted, is on Page 235.

16 Fourth, and finally in their opposition, the
17 plaintiffs argue that the arbitration provision is
18 unenforceable under the PSA because Perdue provided Butler
19 with a 2017 modification to the 2015 agreement, but that the
20 2017 agreement failed, as I said, to provide an opt-in or
21 opt-out arbitration provision. And as I've already
22 indicated, I find that argument unpersuasive.

23 So I will now discuss whether Butler's claims
24 are covered by that the arbitration agreement, and, if so,
25 whether Butler, nevertheless, escapes its application

1 through the effective vindication doctrine.

Once again, we have to first understand the law that I'm required to apply. Perdue, as the party seeking to enforce the arbitration provision, bears the burden to show that it's applicable. I'm citing *Hancock vs. AT&T*, a Tenth Circuit decision from 2012. The PSA contemplates arbitration of PSA claims, subject to disclosure requirements. Mandatory arbitration of PSA claims is permitted if a contract conspicuously discloses that it allows a producer or grower, prior to entering the contract, to decline to be bound by the arbitration provision. That's the provision of 7 United States Code, Section 197c(a)(b) that we previously mentioned. And the Federal Arbitration Act provides that a written provision in any contract to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable and enforceable save upon such grounds that exist at law or in equity for the revocation of any contract. That language from 9 United States Code, Section 2.

21 The Supreme Court commenting on this language
22 has explained that it reflects a liberal federal policy
23 favoring arbitration. And that was explained further in the
24 Conception case from 2011. And in *Italian Colors*, the
25 Supreme Court said the overarching principle is that

1 arbitration is a matter of contract. And more recently, the
2 Tenth Circuit in *Jacks vs. CMH Homes* explained that
3 arbitration is a matter of contract. And in order to
4 determine whether a party has agreed to arbitrate a dispute,
5 courts in this circuit are instructed to apply ordinary
6 state law principles that govern the formation of contracts.

7 I'm instructed that a party cannot be
8 required to submit to arbitration any dispute which he or
9 she has not agreed to submit to arbitration. And while
10 doubts concerning the scope of arbitrable issues are
11 resolved in favor of arbitration, the presumption of
12 arbitrability falls away when parties dispute the existence
13 of a valid and enforceable arbitration agreement in the
14 first instance. All of that is language from that Tenth
15 Circuit decision, *Jacks*.

16 I'll first take up whether Perdue has shown
17 that Butler's Sherman Act and PSA claims are covered by the
18 2015 arbitration agreement.

19 While antitrust and PSA claims are not
20 categorically shielded from arbitration, an issue clearly
21 answered in the PSA itself and *Italian Colors* and other
22 cases, that does not mean that they are necessarily covered
23 by this agreement. Here, the broad arbitration agreement
24 found at Section VII(B) does appear to cover the claims
25 asserted by Butler in this case. That provision provides

1 that "all complaints and disputes by and between" Butler and
2 Perdue, irrespective of whether those complaints or disputes
3 relate to the 2015 agreement, shall be resolved by Perdue's
4 complaint resolution procedure and/or arbitration, as the
5 case may be. While it seems strange to require a grower
6 like Butler to take antitrust claims to a flock advisor,
7 plaintiffs haven't persuasively argued why this oddity
8 requires the Court to ignore the plain language of the
9 agreement. And once a grower goes through the admittedly
10 odd complaint procedure, they are then able to instigate
11 arbitration. And this broad provision requires more claims
12 than other parts of the 2015 agreement's complaint and
13 arbitration procedures. For instance, in another part,
14 Section VI more narrowly states that the complaint
15 resolution and arbitration procedures apply to complaints or
16 disputes arising from the agreement. That was -- that's
17 explained at Page 9 of 192-2.

18 But plaintiffs complain that, even if the
19 claims are covered, that I should decline to enforce the
20 provision because the effective vindication doctrine
21 requires that result.

22 As I've said, the Supreme Court explained in
23 *Italian Colors* that, under the effective vindication
24 doctrine, a court may invalidate on public policy grounds
25 arbitration agreements requiring a signatory to

1 prospectively waive their right to pursue statutory
2 remedies. That discussion at Page 235 of the decision
3 quoting, in part, the *Mitsubishi Motors Corp.* case from
4 1985. In addition to invalidating a provision in an
5 arbitration forbidding the assertion of certain statutory
6 rights, the doctrine might also invalidate, or be available
7 to invalidate provisions imposing fees attached to arbitration
8 that are so high as to make access to the forum
9 impracticable. But the expense involved in proving a
10 statutory remedy is not the same as eliminating the right to
11 pursue that remedy. And the fact that an arbitration
12 agreement increases some costs will not necessarily
13 invalidate the arbitration agreement.

14 Under these principles, the *Italian Colors*
15 court upheld an arbitration agreement that the Sherman Act
16 class action plaintiffs were seeking to avoid, which
17 required them to arbitrate their claims individually rather
18 than on a class basis.

19 Plaintiffs argue that multiple provisions in
20 Butler's agreement run afoul of the effective vindication
21 doctrine. And before I discuss them, let me first note that
22 I am unpersuaded by Perdue's initial response to the
23 plaintiffs' argument on this issue. That is that the
24 plaintiffs have, as a threshold matter, ignored the fact
25 that Butler voluntarily entered into the arbitration

1 agreement, indeed opted into it, and that she cannot now
2 express what Perdue terms buyer's remorse. That argument is
3 in Docket 205 at Page 7.

4 That argument was soundly rejected by the
5 Tenth Circuit in *Nesbitt vs. FCNH*, a 2016 decision. Indeed,
6 plaintiffs made this point in their briefing at Footnote 9.
7 In *Nesbitt*, the court explained that the fact that the
8 arbitration agreement the plaintiff had entered into
9 contained an opt-out provision could not preclude the
10 doctrine's application, because in the cases the doctrine is
11 applied, the courts must necessarily have found that binding
12 arbitration agreement under which the parties agreed to
13 submit claims to arbitration. The opt-out option, or, in
14 this case, the opt-in provision is irrelevant once the
15 parties have the agreement in place. And that discussion
16 was on Page 378 of that Tenth Circuit decision.

17 Further, at least in my judgment, Perdue's
18 attempt to distinguish *Nesbitt* appears wholly unavailing
19 when Perdue argues that, because their opt-in complied with
20 the PSA regulations to create a valid arbitration clause,
21 the agreement should somehow escape evaluation under the
22 effective vindication doctrine. That argument is on Page 6.
23 Every agreement evaluated under effective arbitration is,
24 initially, procedurally enforceable or else we wouldn't
25 reach the doctrine. And the PSA, just as a matter of

1 statute, puts in place extra protections to make sure those
2 agreements don't improperly bind growers. But once there is
3 a binding agreement, and that's just the first step, the
4 next step necessarily follows. And that's the question
5 here. Does it impermissibly trample certain statutory
6 rights? Not every binding agreement does.

7 Turning to plaintiffs' specific arguments for
8 application of the effective vindication doctrine, I have
9 differing views on the six issues the plaintiffs identify,
10 which I have generally placed into four categories and will
11 take up in ascending order of my concern. And in the end, I
12 conclude the doctrine applies to permit Butler to escape
13 application of the arbitration agreement.

14 First, discovery. Discovery is available
15 under the agreement only upon showing substantial need.
16 This does not clearly trigger the application of the
17 doctrine. It sets forth a slightly different standard, the
18 arbitration clause does, but does not preclude discovery,
19 nor does it clearly hinder vindication of any rights.
20 Speculating that somehow, some day Butler might not get the
21 discovery she sought or needed or could not use discovery
22 gained in this case is not enough in my judgment.

23 Second, requiring Butler to pay arbitration
24 fees. There are plenty of cases suggesting that fees might
25 trigger application of the doctrine if a plaintiff meets an

1 initial burden to show that they would be somehow
2 cost-prohibitive. And here *Nesbitt*, I think, is
3 illuminating. In *Nesbitt*, the plaintiff had submitted
4 evidence of the likely cost of arbitration, and evidence
5 demonstrating why it would be prohibitive. The problem
6 here, of course, is that we don't have any such evidence.
7 So while it might have been an avenue to trigger application
8 of the doctrine, the plaintiffs' showing here, at least in
9 my judgment, is insufficient.

10 Third, we have the question of the statute of
11 limitations. Under the arbitration agreement, a plaintiff
12 is required to assert a claim within 120 days as opposed to
13 four years, which is the statute under the Sherman Act, or
14 that a claimant would normally have under the PSA. The
15 Fourth Circuit court of appeals in *Cotton Yarn* allowed a
16 one-year statute of limitations to apply in an arbitrable
17 Sherman Act claim. And in so doing, that court noted the
18 statutes of limitations may be shortened by agreement,
19 unless they are unreasonably short. And of course that
20 decision, the *Cotton Yarn* case is a 2007 decision.

21 I find that 120 days is an unreasonably short
22 time frame within which to require a prospective plaintiff
23 to assert a Sherman Act claim, or the type of PSA claim
24 asserted here. And that determination hinges on the nature
25 of the claims, complex antitrust claims, one that defendants

1 here rightfully point out in their joint motion to dismiss
2 demands highly detailed factual allegations and complex
3 legal justification.

4 Fourth, of most concern to me in view of the
5 case law, is the fact that the remedy -- there is the nature
6 of the remedies barred under the arbitration agreement.
7 This agreement eliminates the right to recover attorneys'
8 fees and treble damages, which the *Italian Colors* court
9 specifically recognized in dicta as important to vindicating
10 Sherman Act rights. It also prevents recovery of any
11 injunctive relief. And in my view, these present
12 insurmountable problems for Perdue in this case.

13 And Perdue's response to these concerns about
14 the barred remedies in its reply falls far short in my
15 judgment. Though Perdue offers at least some discussion in
16 its reply concerning costs, discovery, and the statute of
17 limitations, there really is no direct engagement on the
18 issue of barred remedies. At best, Perdue cites the *Cotton*
19 *Yarn* case and argues the Fourth Circuit there rejected the
20 plaintiff's urged application of the effective vindication
21 doctrine. And I quote Perdue's description, "Even where the
22 arbitration provisions limited the statute of limitations
23 period, the scope of discovery, and plaintiffs' potential
24 damages recovery under the Clayton Act." That was Page 9 of
25 Perdue's brief. But in that case, I could not find an

1 explicit reference to any contract term limiting damages.
2 At most, in that case, the plaintiff had argued that a
3 shorter statute of limitations might have a practical effect
4 of reducing the amount of damages they could recover
5 because, they contended there, that the period of harm would
6 be reduced.

7 But the court of appeals rejected that
8 argument, noting it amounts to little more than an operation
9 that the limitations period under the arbitration agreements
10 is shorter, and the unremarkable recognition that
11 limitations provisions affect the amount of damages that may
12 be recovered. The discussion was at Page 288 of the
13 decision. There is no arbitration provision I could find
14 discussed in *Cotton Yarn* that expressly affected the
15 remedies the plaintiff could seek as the Perdue arbitration
16 agreement does in multiple ways. Thus, Perdue has
17 essentially not addressed this argument in its reply.

18 The Court concludes the arbitration
19 agreement's limitation of the statute of limitations for
20 complex antitrust claims and the barring of remedies
21 otherwise available to Butler, and critical to vindicating
22 rights under the applicable federal statute, warrants
23 application of the effective vindication doctrine under
24 which I conclude Butler is not bound by the arbitration
25 agreement with regards to the claims she seeks to pursue in

1 | this case.

2 And I'll note that, at oral argument, Perdue
3 offered some allusion to possibly severing certain clauses
4 from the arbitration agreement in order to save it. But
5 Perdue had offered not a word in response to plaintiff's
6 contention in their opposition that the problematic
7 provisions could not effectively be severed. Perdue waived
8 its response in argument, in the Court's view, and otherwise
9 inadequately briefed it, and I will not undertake a
10 rewriting of the arbitration provision.

As a final matter, Perdue argues, pursuant to another provision in the 2015 agreement, that Butler has waived certain rights related to class actions. And I decline at this time to evaluate and apply that provision so far in advance of the class certification stage. And to the extent that Perdue argues here that Butler -- that without Butler as a class plaintiff, claims against Perdue cannot continue, I disagree given the nature of the allegations in this antitrust case. The other plaintiffs allege Perdue conspired to violate antitrust laws, and that they were harmed as a result. There is no reason, at least in face of the argument and briefing submitted by Perdue at this point, why those claims cannot proceed. Of course, we may have to take up the class issues later.

25 I greatly appreciate your patience as we got

1 through all of that. The effect of that is to deny Perdue's
2 motion to compel arbitration.

3 And that naturally leaves me wondering where
4 we are and where we're headed. The plaintiffs --
5 Mr. Cramer, the plaintiffs still maintain that some
6 modification to the allegations in the consolidated
7 complaint are necessary to bring it in compliance with the
8 bankruptcy court's order?

9 MR. CRAMER: Your Honor, we believe that's true,
10 some minor modifications. Mr. Smith is going to handle it,
11 so I will have him --

12 MR. SMITH: It will be brief, Your Honor.

13 THE COURT: Would you kindly come to the podium to
14 aid the court reporter? Thank you.

15 MR. SMITH: Yes, Your Honor. We think the
16 bankruptcy issue is relatively easy to resolve. Our
17 amendment would clarify three things. It would clarify that
18 we are not seeking any damages flowing from conduct that
19 predated Pilgrim's bankruptcy discharge.

20 THE COURT: Against Pilgrim or any defendant?

21 MR. SMITH: Against Pilgrim. Pilgrim is the only
22 one entitled to the benefit of the discharge. We are going
23 to then clarify -- this is in our complaint, but we will
24 just emphasize that we are only seeking damages from 2013
25 onwards. And of course the bankruptcy discharge was several

1 years before that. And that, finally, we will clarify that
2 Pilgrim committed overt acts in furtherance of the
3 conspiracy after the date of its discharge, which brings it
4 back into the fold for liability purposes for the
5 conspiracy.

6 We would propose that we would bring a motion
7 to amend before Your Honor on a timetable to be discussed
8 among the parties and Your Honor, and then Your Honor could
9 rule upon that motion to amend.

10 THE COURT: Do you know today as you're here,
11 speaking on behalf of the plaintiffs collectively, whether
12 the plaintiffs are contemplating any additional
13 modifications to the complaint beyond those you've just
14 outlined?

15 MR. SMITH: Yes, Your Honor. There is one sort of
16 clerical issue. At the outset of the case, Perdue had told
17 us that we had named the incorrect legal entity, and we had
18 reserved the amendment to bring in the correct legal entity
19 so as not to disrupt the briefing schedule. And so we would
20 make that sort of clerical amendment in the complaint. But
21 other than that, I don't see any other amendment that would
22 be necessary.

23 THE COURT: Okay. Thank you. Defendants, let me
24 just say in response to what I just heard, what makes the
25 most sense to me I think is to construe that as an oral

1 motion to make those modifications to the complaint, and I
2 don't think they are substantive with respect to any of the
3 legal issues that have been addressed, and I'm inclined to
4 grant that motion today so we can get the complaint on file
5 and get moving. But let's hear from all of you, or those of
6 you who care to be heard. Mr. Bailey.

7 MR. BAILEY: Good afternoon, Your Honor.

8 THE COURT: Hi. Welcome.

9 MR. BAILEY: Well, I appreciate what the
10 plaintiffs are saying about seeking leave, but we need some
11 specifics as to when these overt acts that my client engaged
12 in occurred. We heard that they may be seeking damages from
13 2013 forward, but when are the acts and what were the acts?
14 We need to see that amended complaint before we should go
15 forward.

16 THE COURT: Before I --

17 MR. BAILEY: I think there needs to be some more
18 meat on that bone.

19 THE COURT: But before I decide whether we should
20 receive it? We're just talking procedure right now. Like
21 whether we should require the filing of a motion seeking
22 leave to amend the complaint, attaching a copy of the
23 amended complaint and inviting a brief, doesn't that just
24 add one additional step to getting to the core issue? Your
25 concern may be present, which is --

1 MR. BAILEY: We've got a bankruptcy issue here,
2 Your Honor, and I need to see what the complaint is, because
3 what they're alleging may not satisfy what the bankruptcy
4 court has ordered them to do. We have an injunction in
5 place. I would just say this: The bankruptcy court ruling
6 was in March of 2018. The plaintiffs know what the issues
7 are. I would think if they had -- I don't know, I'd leave
8 it up to them -- 15, 30 days, if even that long, to file a
9 formal motion for leave with the amended complaint attached,
10 and give -- you know, Pilgrims will agree to a ten-day time
11 frame to respond. That should be plenty enough.

12 || THE COURT: That's seems --

13 MR. BAILEY: Does that seem fair to the Court?

19 MR. BAILEY: Thank you, Your Honor.

20 THE COURT: Mr. Smith.

21 MR. SMITH: Yes. Just to clarify what the
22 bankruptcy court injunction said, was it said that we cannot
23 proceed against Pilgrims until we have amended the
24 complaint. That's what we're trying to do. That's what
25 your order or granting the oral motion would accomplish.

1 There's no bar to us proceeding in that way if that's how
2 Your Honor would like to proceed.

3 THE COURT: I appreciate that. My --

4 MR. SMITH: And as to overt acts, Pilgrims, every
5 day from 2013 -- every week from 2013 to the present,
6 committed an overt act by exchanging information with its
7 co-conspirators. So we don't think the overt act issue is
8 particularly hard to flesh out in this case.

9 THE COURT: I think I understood Mr. Bailey to --
10 he didn't say this, but I think I understood him to raise
11 two different concerns. One is one related to the substance
12 of the allegations, and the other, allegations that may
13 implicate the injunction. And it's the latter, not the
14 former that has me most concerned about the procedure that
15 we're going to employ. I don't think it will be
16 unreasonable to require you to submit a motion with an
17 attached proposed second amended consolidated complaint I
18 suppose. When would you -- when would you contemplate doing
19 that?

20 MR. SMITH: We could have that on file in four
21 weeks if that would please the Court.

22 THE COURT: It's your --

23 MR. SMITH: Or three weeks.

24 THE COURT: It's your -- you tell me. It's your
25 complaint. Three weeks -- three weeks from today? I don't

1 have a calendar.

2 MR. CRAMER: January 27th.

3 MR. SMITH: January 27th, Your Honor.

4 THE COURT: Thank you. January 27th. We'll look
5 for a motion for leave to amend on or before January 27th.
6 And a response, if any, from Pilgrims Pride within three
7 weeks of that date, Mr. Bailey?

8 MR. BAILEY: That will be fine, Your Honor. Thank
9 you.

10 THE COURT: Thank you. I think that's February
11 17th. All right.

12 MR. CRAMER: February 17th is President's Day just
13 in case --

14 THE COURT: Well, we'll honor our presidents. No,
15 we'll -- thank you. The 18th. February 18th for -- on or
16 before February 18th.

17 Plaintiffs, you have told us today -- well,
18 this is going to be crucial I think. The answers need to be
19 drawn to the operative complaint, and it won't make any
20 sense to anybody to respond to this complaint because it's
21 going to change. So we will stay the time for answering the
22 complaint until after the Court decides the motion for leave
23 to amend. And that ruling will include -- well, if there's
24 going to be -- if the Court is going to be ordering answers
25 from parties, I'll include a time line for that in the

1 ruling that we provide on the order deciding the motion for
2 leave to amend. I think that's the best way to go forward.

3 And then the next thought that I have, we
4 have -- I stayed -- at the defendants' request, I stayed
5 discovery in this case at the outset, in contravention of my
6 own practices and I think the practices that are the
7 preferred practices in the Tenth Circuit generally. And it
8 seems to me that it's time now to begin discovery. But
9 let's -- I assume the plaintiffs wish to proceed with
10 discovery.

11 MR. CRAMER: Yes, Your Honor, we do.

12 THE COURT: So let's hear from the defendants.
13 Thank you. Ms. Adcox.

14 MS. ADCOX: Thank you, Your Honor. And we do
15 appreciate your inclination to move this case forward in a
16 relatively expedient manner going forth. We think the
17 quickest way to do that is, as Your Honor suggests, to get a
18 new consolidated amended complaint on file. To allow the
19 parties to look at that. To allow the parties, including
20 Perdue and Tyson, to respond to that complaint, if such a
21 response is necessary. Obviously we don't know exactly what
22 amendments the plaintiffs will make until we actually see
23 the complaint.

24 The concern that we have, and the reason that
25 we believe the stay should remain in place, until the

1 complaint is resolved upon and any motions to dismiss are
2 decided is that we are greatly burdened by piecemeal
3 discovery. We know, for example, that the plaintiffs will
4 want to bring Pilgrims back if Tyson and Perdue, for
5 example, are off and running in discovery negotiations. Any
6 sort of a late entry by Pilgrims can cause quite a bit of
7 inefficiency and confusion. Pilgrims will want their
8 opportunity to challenge the new allegations in the
9 complaint, if that's appropriate, and will end up having to
10 play catch-up or otherwise stall the rest of discovery in
11 the case. Pilgrims, in the meantime, would also be unable
12 to weigh in on any procedural issues that need to get
13 discussed in the interim, which will prejudice them, and I'm
14 sure Mr. Bailey can address that if he feels the need.

15 Piecemeal discovery in this case would also
16 be burdensome and costly because of the geographic scope of
17 the case that Your Honor has now ruled upon. Documents and
18 personnel are likely to not be centrally located. There are
19 grower complexes all over the United States. There are also
20 issues with the fact that search parameters that plaintiffs
21 will most likely want to start negotiating will be affected
22 by any sort of disparity or later addition of claims or
23 facts, and particularly with respect to the use of
24 technology-assisted review which requires some certain scope
25 of the case.

1 THE COURT: I'm sorry, I want to make sure I
2 understood the last thing you said.

3 MS. ADCOX: Sure.

4 THE COURT: I think what you were suggesting was
5 that our uncertainty about what claims might be asserted in
6 the complaint and be answered by the defendants creates a
7 specific burden in here because of the ESI inquiries that
8 will have to be -- those will be tailored to the claims.
9 And until we know the claims, we can't know the inquiries,
10 and let's just do it once and not twice. Is that what you
11 were saying?

12 MS. ADCOX: That's effectively what I'm saying.
13 And, Your Honor, I think that, in this case particularly, if
14 plaintiffs are true to their word --

15 THE COURT: I can't tell for sure, but it looks
16 like our court reporter might be having trouble, A, hearing
17 you, and, B, you might be speaking really quickly.

18 MS. ADCOX: Thank you, Your Honor. I will correct
19 both. I also think, Your Honor, that if plaintiffs are true
20 to their word here, and that the scope of their amendments
21 will be somewhat limited, the effect of the stay will not
22 prejudice them. All it will do is serve to move the case
23 forward in the most efficient manner by making sure that all
24 of the parties are on the same page.

25 THE COURT: Okay. Rather than just rule against

1 you, I want to credit your argument and make sure I'm giving
2 it full weight. I am certain -- I'm nearly certain that
3 discovery, as you said, will be complicated and expensive in
4 this case. Courts ordinarily proceed in cases without
5 waiting for resolving motions to dismiss and narrowing
6 claims and whatever else happens. Moreover, that discovery
7 is going to happen in this case. I've now overruled the
8 substantive objections to the Sherman Act claim and PSA
9 claim. And Pilgrims may raise specific objections about the
10 sufficiency of certain allegations as to Pilgrims. They may
11 raise issues relating to the scope of the new allegations
12 vis-a-vis the bankruptcy injunction order. I don't
13 understand that anything Pilgrims is going to say -- and I
14 accept the plaintiffs' representations today about the
15 nature and scope of the proposed amendments. Nothing
16 Pilgrims is going to say is going to prevent that discovery
17 from going forward. Isn't it just time to start, in
18 fairness to the plaintiffs who have been waiting two years,
19 to just begin, to have a Rule 26(f) conference and serve
20 some discovery?

21 MS. ADCOX: Well, I appreciate, again, Your
22 Honor's view on this. I think our concern simply is with
23 the piecemeal nature of the discovery that might result if
24 we have Pilgrims on one track and the two defendants on the
25 other track. And so anything we can do to avoid that, Your

1 Honor, would obviously be appreciated.

2 THE COURT: So there's no reason, is there, that
3 Pilgrims couldn't participate in a Rule 26(f) conference
4 like defendants do all the time in cases where they're named
5 but haven't yet answered? Do you want to --

6 MS. ADCOX: I would like -- no, I'd like to defer
7 to Pilgrim's counsel for obviously his opinion.

8 THE COURT: Sure. Do you see any reason why they
9 couldn't participate? Would you object to their
10 participating in a Rule 26(f) conference?

11 MS. ADCOX: We would not object. But, again, I
12 cannot speak for Pilgrims as to whether they would object
13 with no operative complaint on file.

14 THE COURT: Okay. Thank you. Before we hear from
15 Pilgrims, Mr. Smith or Mr. Cramer, do you object to Pilgrims
16 participating in an attorney planning conference before --

17 MR. CRAMER: We do not object.

18 THE COURT: -- they answer it or move to dismiss
19 your complaint?

20 MR. CRAMER: No, we do not object, Your Honor.
21 And the discovery can proceed before -- there's going to --
22 it's going to take time to negotiate a Rule 26(f) report to
23 Your Honor. That can proceed. By the time we have a Rule
24 16 conference, I think the operative complaint will be clear
25 and the allegations will be clear. There's nothing

1 mysterious. And we think it's time to begin moving forward.
2 There are a number of documents that these parties have
3 already produced to the Department of Justice relating to
4 some of these underlying claims in the consumer case related
5 to these underlying claims. We have to negotiate a
6 confidentiality agreement. There's going to be -- we have
7 to negotiate search terms, and those are going to be similar
8 whether Pilgrims is there or not. We -- there are a lot of
9 preliminary things that can and should be accomplished over
10 the next few weeks, and that can happen while we're working
11 on the very minor amendments to the complaint.

12 THE COURT: The plaintiffs -- let me -- Mr. Smith
13 I think answered this question, but let me just ask directly
14 and to the point. The plaintiffs have no intention of
15 articulating a new theory of the case as to Pilgrims?

16 MR. CRAMER: We do not.

17 THE COURT: No new claims as to Pilgrims?

18 MR. CRAMER: We do not.

19 THE COURT: Your intent in the further amendment
20 is to narrow the scope of the claims that are already
21 asserted against Pilgrims. Is that true?

22 MR. CRAMER: Correct, Your Honor.

23 THE COURT: Thank you. Mr. Bailey.

24 MR. BAILEY: Your Honor, Pilgrims doesn't have a
25 problem discussing or having a conference about scheduling,

1 or even a protective order in this case. I think the only
2 problem I have, again, is if we get into some type of ESI
3 protocol or who my custodians are going to be, that type of
4 thing. Until I see the complaint that's alleged, what date
5 is it going to be that we supposedly, you know, entered into
6 this conspiracy after December 20, 2000 -- I hear 2013.
7 Just when is it? That does have an impact. People come and
8 go in corporations. If they say it started June 1 of 2013,
9 that may impact the custodians who left before then on the
10 live production side.

11 So that's the issue I have, is it really
12 causes me to speculate in trying to negotiate things. As it
13 relates to dates and things like that for scheduling, we can
14 engage in those discussions.

15 THE COURT: I appreciate that, Mr. Bailey. We're
16 talking about the proposed second amended class action
17 complaint being on file on or before January 27th. And you
18 strike me as a really bright lawyer. And while I'm
19 confident that you may be partially handicapped in your
20 ability to provide some information prior to the 27th, I'm
21 sure that -- I'm sure we can work our way around it.

22 It's time to begin. I'm going to lift -- I'm
23 ordering lifted the stay on discovery that I previously
24 imposed in the case. And I don't know that it will be
25 helpful for me to start doing anything more with respect to

1 discovery now. You all begin. It's time to have a Rule 16
2 conference, I think a Rule 26(f) conference.

3 I'm just now thinking about -- now I'm
4 wandering into space where I think I'd like your feedback
5 about something. I've said now at least twice and probably
6 three times -- I'm sorry if I'm being repetitive -- I think
7 you would all benefit from an A referral to a magistrate
8 judge in this district for the non-dispositive matters,
9 specifically for two reasons. One is that the plaintiffs
10 chose this forum. And one of the calculations in choosing a
11 forum I think, and appropriate consideration, are the rules
12 that will govern the proceedings. And I think you're
13 entitled to the application of the local rules. And that
14 would be more efficiently done by a magistrate judge who
15 implements those rules on a day-to-day basis consistent with
16 the standing custom and practice. That may also have been
17 an appropriate consideration by the plaintiffs choosing this
18 forum. Second, and while I can -- we'll talk a little bit
19 more about case management and the District Court's
20 involvement. Having a local magistrate judge will make it
21 much, much easier to have hearings if they are necessary on
22 any of the case management issues that the magistrate judge
23 will oversee, at least in the first instance. So I propose
24 to enter an A referral and have one of the local magistrate
25 judges assigned for that reason. But I'm open to some

1 discussion about that if anybody cares to weigh in.

2 Mr. Cramer.

3 MR. CRAMER: Your Honor, we think that is a good
4 idea as long as the magistrate judge is limited to
5 discovery-related matters. We would like Your Honor,
6 obviously, to consider the summary judgment motion, the
7 class certification motion, and the entire scheduling of the
8 case. We think Your Honor should consider the case as a
9 whole and how that's going to proceed, and then allow the
10 magistrate judge to deal with the discovery disputes as they
11 arise. Because the case -- the case schedule, that is how
12 we're -- how long discovery is going to last, when summary
13 judgment will be briefed, how class certification is going
14 to happen, when the expert reports will be due, whether
15 they'll be -- class and merits reports will be separate or
16 whether they'll be combined, there will be a number of
17 issues that will, I think, given that Your Honor will be
18 considering the class motion and the summary judgment motion
19 and, ultimately, as we head towards trial, we think that it
20 would be best if Your Honor considered the overarching
21 schedule, and then allow the magistrate to work within that
22 schedule.

23 THE COURT: Okay. Defendants. Ms. Adcox.

24 MS. ADCOX: Thank you, Your Honor. We do not have
25 any issue with the appointment of the magistrate judge. But

1 we do think it sufficient if the magistrate judge does make
2 scheduling rulings in consultation with Your Honor as
3 opposed to Your Honor being somebody that we're back to when
4 and if schedule changes are necessary midstream in the
5 case.

6 THE COURT: Okay. Well, I'm going to think about
7 that and consider that. Look, this is not a routine case,
8 at least not in my judgment. And I anticipate, given the
9 complexity of the issues, the nature of the issues, the
10 nature of the claims, the number of the parties, the
11 sophistication of counsel and the like, and also whatever --
12 whatever months of delay I'm accountable for in this case.
13 I'm going to be actively involved in the management of the
14 case, more so than I ordinarily am in a case has an A
15 referral. And my instinct is, but I'm going to think more
16 about what you've all said -- and I wonder, when I say an A
17 referral, you all -- yes. Okay. Under the Magistrate Act,
18 right? So non-dispositive motions subject to an appeal, or
19 objections and things of that nature. Ordinarily that is
20 all non-dispositive motions.

21 But that is not what I had in mind in this
22 case. Mr. Cramer, you brought up the class motions. I'll
23 decide the class certification issues in the case. And I do
24 think that this is an appropriate case for active
25 involvement in the scheduling, at least in the first

1 instance. But I think the practice I'll employ is we'll
2 actively manage -- monitor the docket and if there -- we'll
3 be active in regular communication with the assigned
4 magistrate judge. And I may unrefefer specific motions that
5 get filed so that we can address them directly. And I'll
6 just -- I don't -- we'll do it on a case-by-case basis I
7 think.

8 Related to that point, though, now I'm just
9 asking you how I can help best serve all of you. I've had
10 cases where it's been helpful to have monthly status calls.
11 I've had cases in MDL that we manage where I require the
12 parties to submit 60-day reports and raise issues that the
13 parties are having trouble resolving so that I can be
14 involved. I'm just trying to think about the most effective
15 way for me to help all of you get answers to the questions
16 you're going to need answered. Maybe it's just through the
17 traditional motion practice. I don't want to impose
18 additional time and expense on the parties by requiring you
19 to come here for hearings quarterly or more often just to
20 have a hearing. So I don't know. I think what might be
21 most helpful is to receive periodic reports from counsel
22 concerning the issues that you're working on, the success
23 you're finding, and those issues that are arising where you
24 need the Court's involvement. And it could be done in an
25 informal way through this, it could be a joint submission by

1 the parties on whatever schedule we agree to. And insofar
2 as you agree about things in the joint submission, that
3 would be set out. And insofar as anybody wanted to say
4 something else that others didn't agree with, you can
5 include that. We could review those reports, and then we
6 could either have calls or meetings as necessary to address
7 whatever issues have arisen. I'm sort of thinking out loud
8 while I'm talking now, but I'm finding that I like my idea,
9 which is not surprising maybe. But let me ask for your
10 thoughts about that.

11 MR. CRAMER: Your Honor, Eric Cramer for the
12 plaintiffs. Yeah, we agree. We think that periodic joint
13 submissions with the opportunity for each party, if there is
14 disagreement, to weigh in on what their disagreement is and
15 their respective positions are would be a good idea. So I
16 think that is a good idea. And then, as result of those
17 regular joint submissions, there may be a point at which
18 enough disputes have arisen where a hearing, telephonic or
19 in person is necessary. So we think that's a good idea.

20 THE COURT: Defendants, I don't know if you have a
21 response you care to share.

22 MS. ADCOX: Your Honor, I think we would need to
23 take care to make sure that the regular submission of these
24 reports doesn't actually precipitate disputes rather than
25 resolve them, and that may be solved by having them on a

1 less frequent basis perhaps.

2 MR. CRAMER: Your Honor, in my experience, the
3 practice of doing a joint report to a court often helps
4 resolve disputes because parties have an interest in not
5 being obstreperous and showing that they're trying to work
6 things out in a reasonable fashion. But that's just been my
7 experience. Others might have a different experience with
8 that.

9 THE COURT: We're going to -- I do need to take a
10 very short recess for a moment. I think we'll be like five
11 minutes. But why don't we take a very short break and come
12 back and continue this discussion. It will be less than ten
13 minutes. Thank you.

14 *(Off the record at 12:37 p.m.)*

15 *(Back on the record at 12:50 p.m.)*

16 THE COURT: My apologies for that interruption.
17 I'm informed that I misspoke in announcing the conclusion of
18 our ruling on the earlier motions, though all of you knew
19 what I meant, which is why you weren't alarmed. I think I
20 said -- I must have said that the plaintiffs' joint motion
21 to dismiss was denied. And of course it was the defendants'
22 joint motion.

23 All right. Well, I think -- I appreciated
24 hearing from -- though I guess we didn't hear from all the
25 defendants. I think Ms. Adcox had a moment and was

1 consulting with her colleagues before she spoke about status
2 reports. I think that makes sense to me is a good way for
3 us to begin this case. It's worked for us in MDL
4 proceedings. And when I was a lawyer in class action
5 litigation, I thought it was helpful to avoiding disputes
6 percolating to the motion stage and requiring more --
7 required fewer motions I think than not requiring that
8 process. I do know they can be burdensome, though, and time
9 consuming, and so I don't want it to overwhelm what you
10 actually need to do.

11 I'm going to propose, at least initially,
12 that we start with 90-day status reports and let's go from
13 there and see how it works. And I'll read whatever you
14 submit, and so make them as brief or as lengthy as you need.
15 You can take advantage of those reports as an opportunity to
16 inform me and educate me about things. It won't be super
17 helpful to you to be arguing the merits of a lot or
18 pre-arguing the merits of things. We'll get to those. But
19 let's just get a sense for it, a measure of it. The first,
20 if we start on a 90-day schedule, this is the beginning of
21 January, about a 90-day report -- actually, let's do this.

22 I'm going to propose -- and we'll talk in a
23 moment about whether this makes sense to any of you. I'm
24 going to propose that we hold a date for a potential
25 hearing, if we need one, in early April before Easter. And

1 so maybe your first report, it would be helpful if it came a
2 week earlier. Let's just think about the first report being
3 due on -- submitted by March 30th. And I don't know, I hope
4 it's not horribly burdensome for all of you for us to have
5 Monday hearings. It's just a good day for me to do it. It
6 requires you to travel on Sunday. I don't know that we need
7 to meet in person in early April to decide any issues to fix
8 the pleadings finally. But I'm going to propose that we
9 hold Monday, April 6th as a hearing date, if we need it, to
10 get together and resolve any outstanding motions. April 5th
11 I think is Palm Sunday, but we're far enough out from Easter
12 I hope it wouldn't interfere with any of your schedules.
13 Can you be available -- Mr. Cramer, can the plaintiffs be
14 available on the 6th?

15 MR. CRAMER: Yes, we can, Your Honor.

16 THE COURT: And are there defendants who are
17 unable to be present on the 6th?

18 MS. ADCOX: No, Your Honor.

19 THE COURT: Okay. I don't know that we'll have
20 that hearing or we won't. Let's see what unfolds in the
21 briefing in the next little bit. I picked that time period
22 just sort of working backwards from what I think the
23 briefing schedules may be on the motions, and so we'll have
24 your report the week before. And if it becomes clear that
25 we don't need to have a hearing, I'll vacate that hearing as

1 early as I can so you can -- you don't -- so you have
2 control over your schedules.

3 What else should we take up while we're here,
4 if anything, from the defendants' perspective?

5 MS. ADCOX: No, Your Honor.

6 THE COURT: From the plaintiffs?

7 MR. CRAMER: Your Honor, think it would be helpful
8 for you to schedule a date for the Rule 16 conference
9 because that date -- from that date flows the 26(f) report
10 and the other things the parties need to do. And that could
11 be either by telephone or in person. But we suggest at some
12 point in the first two weeks of March would be a good day
13 for a Rule 16 conference.

14 THE COURT: I wonder if -- so the practice in our
15 court in Utah, the Rule 16 conferences are handled by the
16 magistrate judges, though I am happy to handle -- I think it
17 would be helpful for me to be involved in the Rule 16
18 conference here. Why don't we plan to do that on April 6th,
19 and any motions we'll need to take up. And that may be a
20 few weeks later than you had in mind. But maybe we'll also
21 then have the benefit of your report on the 30th. So we'll
22 set that date as a Rule 16 conference and a motion hearing.
23 That's a good suggestion. Thank you.

24 (Pause)

25 THE COURT: Given that we are going to have a

1 90-day status report on or before March 30th, let me ask
2 counsel if any of you think it would be helpful -- I'll
3 defer to you -- to have a status report on the Rule 16
4 conference separate and apart from that 90-day conference?
5 That doesn't necessarily make any sense to me, and I don't
6 want to create work for everybody. Surely a week before is
7 enough. It's ordinarily submitted two weeks before a Rule
8 16 conference in this district, but I think a week is
9 sufficient unless you have concerns.

10 MR. CRAMER: That's fine with us, Your Honor.

11 MS. ADCOX: No concern, Your Honor.

12 THE COURT: Terrific. Mr. Cramer, anything more
13 from the plaintiffs?

14 MR. CRAMER: No, Your Honor. Thank you.

15 THE COURT: All right. I appreciate your patience
16 today, counsel. Thank you. We'll be in recess. I look
17 forward to seeing you soon.

18 *(Off the record at 12:57 p.m.)*

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C E R T I F I C A T E

2 I, Ken Sidwell, Certified Shorthand Reporter for
3 the Eastern District of Oklahoma, do hereby certify that the
4 foregoing is a true and accurate transcription of my
5 stenographic notes and is a true record of the proceedings
6 held in the above-captioned case.

7 I further certify that I am not employed by nor
8 related to any party to this action, and that I am in no way
9 interested in the outcome of this matter.

13 s/Ken Sidwell
14 Ken Sidwell, CSR-RPR
United States Court Reporter